# Indigenous land rights in (un)settled Australia

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This thesis is dedicated to Doug Allington and Jan Carpenter.

## Synopsis

Indigenous and non-indigenous people in Australia understand the importance of land in different and sometimes conflicting ways. Contact histories since first colonisation are in one sense reviews of this complex and ongoing problem. The debate in late twentieth century Australia over land rights for indigenous peoples both takes account of, and is a new manifestation of, the conceptual difficulties that exist in accommodating different ideas about the significance of land.

Recent historical and epistemological research has provided more detailed and graphic accounts of the struggle that has ensued for the land between indigenous and non-indigenous since first colonisation. However, when such examinations are combined with better descriptions of indigenous societies, it may become more difficult to implement land rights. In practice, extinguishment of native title has been widespread in Australia. This reflects two broader complexities which must be considered as the state attempts to respond to ongoing indigenous relationships to land in contemporary Australia. Firstly, the difficulty of perceiving Aboriginality as wholly modern but also derived from the traditional past. Secondly, the concept of indigenous rights requires an idea of equality but also of distinct indigenous rights.

The connection between land and Aboriginality stems from the connecting of ongoing tradition with rights to land. However, I argue that it may be necessary for Australian institutions and society to be prepared to *not* understand Aboriginality but still acknowledge indigenous relationships to land.

This thesis argues that uncomfortable issues - for example, the *Milirrpum*, *Mabo* and Hindmarsh Island bridge debates - are also sites where an examination of political and conceptual principles can lead to incremental advances in the

acknowledgment of indigenous relationships to land. While acknowledging the importance of such expediency, at the same time I argue that conceptual difficulties are avoided and may become embedded in such advances.

Let the great world spin for ever down the ringing groove of change.

From title page of John Wrathall Bull's *Early Experiences of life in South Australia* 1884.

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

Justice Brennan in *Mabo v Queensland* 1992

## Introduction

> The books are strangely silent on all that matters, so here I am to put them right: watch, and you will see history being made in front of your eyes.[1]

On 3 June 1992 the High Court of Australia made history when the majority judgments in *Mabo and others v State of Queensland* (*Mabo*) found that Australian common law recognised the doctrine of native title.[2] Although native title was confirmed on (most of) the island of Mer in the Torres Strait, *Mabo* also found that native title persisted throughout Australia past the moment(s) of sovereignty acquisition. A new emphasis in the land rights debate now exists but I argue that this legal and political shift in turn requires a better understanding of how land is perceived in Australia. The issue of who owns and can use land is closely linked to a discussion of rights. That is not to suggest that all Australians believe indigenous peoples possess distinct 'land rights' or share a common conception of how such rights might be recognised. Nevertheless, a shift has occurred from welfare towards rights-based approaches, which is reflected not only in federal and State legislation relating to land, but also in ambiguous principles of domestic self-determination. For example, the replacement of the federal Department of Aboriginal Affairs with the Aboriginal and Torres Strait Islander Commission (ATSIC) has created an

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[1] Kate Grenville *Joan Makes History* University of Queensland Press, St Lucia, 1988, p.13.

[2] In *Mabo* the full bench of the High Court ruled six to one that native title persisted on the island of Mer. Although I cite each of the judgments where relevant, most attention is focused on Brennan's leading judgment. I use the *Australian Law Reports* text of *Mabo*, which has been reprinted in full in Richard H. Bartlett *The Mabo Decision - Commentary by Richard Bartlett and the full text of the decision in Mabo and others v State of Queensland* Butterworths, Sydney, 1993. In the text I quote the case and relevant judgment, for example: *Mabo* (Brennan) at 20. Bartlett's commentary is cited as Bartlett *Mabo Decision - Commentary*.

organisation which is intended to act as a bureaucracy *and* as a representative body for indigenous people.

In liberal-democratic nation-states with indigenous minorities, legislative confirmation of the concept of distinct rights to land complicate property and citizenship rights. Robert Vachon suggests the need for

> culturally, pluralistic politics, where there is room for both political cultures living side by side and interrelating, sometimes by keeping a solid distance from each other, sometimes coming together to learn from each other, but always by resisting and emancipating together from the nation-state oriented democracy.[3]

While the sentiment expressed seems faultless, its enactment requires a leap of faith in addition to good legislation and a widespread commitment to restitution. Vachon doubts if restitution can be provided by "some kind of official recognition or empowerment" by the nation-state,[4] but if the state does not respond to indigenous aspirations then the concept of land rights remains abstract. Australian democracy is not static, any more than the 'traditional' Aborigine is unchanging, and the state's responsiveness to rights-based discourse indicates a willingness to address complex questions relating to land.

The *Mabo* decision and subsequent '*Mabo* debate' emerge from contemporary issues relating to indigenous land rights. In turn, the issue of land is related to debate over descriptions of Aboriginality, both historically and in contemporary situations, as well of histories of colonisation and of the economic, political and social development of the Australian nation-state. In affirming the recognition of native title by the common law *Mabo* uncomfortably reduces history to a facade of legal precedent. *Mabo* also

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[3] Robert Vachon "The Future of Native Self Government" *Journal of Indigenous Studies* Vol.1, No.1, Winter 1989, p.5.
[4] *ibid.*

confirms the legal principle that the acquisition of sovereignty occurred via the mechanism of settlement rather than by conquest or cessation. In emphasising the distinction between sovereignty acquisition and property and/or proprietary rights to land the High Court deduced how native title could be recognised by Australian common law. However, continuation of native title is limited by the possibility of extinguishment, in that the theoretical persistence is affirmed but is disrupted by new titles and new people. At the same time, *Mabo* re-activated land rights debate which became stalled following the breakdown of national land rights legislation in 1986 and the stunting of treaty debate with a "process of reconciliation". Despite *Mabo*'s suggestion that native title existed from the time British common law arrived, when I state that *Mabo* made history I mean also that it *made* native title in Australia.

When does disruption of indigenous relationships to land become extinguishment of native title? The *Native Title Act 1993* is enacted to allow determination of this question on a case by case basis. More broadly, the answer depends on representations of indigenous identity, but also on how these interact with characterisations of liberal-democratic identity and relationships to land. There are in particular two contested and related areas of debate which I discuss in this thesis in order to argue that when Australians ask 'what land rights might Aborigines possess?' we must also ask 'what is land in Australia?' and 'what rights do Australians affirm?' These conceptual complexities can become embedded in judicial determinations and legislative enactments relating to land rights.

These areas of debate relate to terms from the title of this thesis, "(un)settled Australia" and "land rights". These terms need elaboration.[5] If it remains true that Australian sovereignty occurred through 'settlement', then there is an irony in the term 'settlement' that reveals a necessarily contested idea about land. As well as its specific legal meaning, the term 'settlement' refers to the establishment of colonies from 1788, and in particular the usurpation of land for new economic uses. These two applications of 'settlement' are so distinct, and their juxtaposition so reveals the complexity of land rights debate, that I distinguish them throughout this thesis. 'Sovereignty settlement' is the diffident legal instrument that confirms the acquisition of sovereignty by Britain over New South Wales, and provides the foundation for the sovereignty of the Australian nation-state. 'Appropriation settlement' is the incremental dispersal of new people, land use, institutions, ideas and expectations across land, referring also to the disruption caused to indigenous cultures by these processes.

A further distinction exists, between 'settled' and 'remote' land. Marcia Langton identifies two broad regions:

> 'settled' Australia, stretching from Cairns around to Perth in a broad arc . . . is where most provincial towns and all the major cities and institutions are located, and where a myriad of small Aboriginal communities and populations reside with a range of histories and cultures . . ..
> 'remote' Australia [is] where most of the tradition-oriented Aboriginal cultures are located. They likewise have responded to particular

[5] I define these terms and other terms to maximise precision of intended meaning in this thesis. Clearly, to define any of them differently, and then to use any of them differently, is a valid political and/or cultural statement.

> frontiers and now contend with various types of Australian settlement.[6]

However, I argue that the Australian landscape remains contested and *unsettled*, in that indigenous relationships to land persist, reflecting in some combination contemporary Aboriginality and the Aboriginal past. Therefore, 'settled' and 'remote' also carry ironic meanings. While I employ the dichotomy, this reflects that indigenous relationships to land are different in, for example, the north west desert and Lower Murray areas of South Australia (as they would have been pre-contact). It does not follow that because Pitjantjatjara culture appears to more closely approximate the 'traditional past' than Ngarrindjeri culture, that relationships to land persist only in 'remote' Australia. Nevertheless, it is more difficult to institute land rights in 'settled' Australia, where alternative uses of the land may seem entrenched, and where different ideas about the significance of the land may seem embedded.

This discussion becomes clearer when the terms 'indigenous relationships to land' and 'land rights' are defined, and the differences and connections between them made explicit. Indigenous relationships to land refers to the dimensions of ongoing meaning of an area of land to an indigenous person or community. The constitution of indigenous cultures is not discussed in this thesis - such representations have mainly been the purview of anthropologists, and even these are exercises in (often consequential) translation.

Land rights are based on interpretations of indigenous relationships to land but are also influenced by how those rights intersect with other rights in Australian society. Land rights refers to a legal and practical recognition by the Australian

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[6] Marcia Langton *'Well, I heard it on the Radio and I saw it on the Television...', An essay for the AFC on the politics and aesthetics of filmmaking by and about Aboriginal people and things* Australian Film Commission, North Sydney, 1993, pp.11-12.

state of indigenous relationships to land. This definition is broad, referring to any right to land bestowed *specifically because of* an ongoing indigenous relationship to land. Jane M. Jacobs defines land rights as a

> process by which Aboriginal groups seek access to resources now in the control of white Australia. Attempts to gain land rights operate within the limitations set by the attitudinal, political and legal constructs of those in power. This hegemonic framework is inequitable and the result has been that some Aboriginal groups have been more successful than others in gaining land rights.[7]

In this thesis I see land rights as outcomes - while not disagreeing with Jacobs, I see her definition as a part of the process towards the possible implementation of land rights.

New questions emerge when the polity attempts to service both indigenous relationships to land and the theoretical underpinnings of liberal-democracy. When does change become extinguishment of an indigenous relationship to land, and what are the connections with the acuteness of appropriation settlement? If the description of Aborigines as either 'primitive' or 'civilised' is discarded, but processes of assimilation are not embraced, then indigenous rights require "equality and difference".[8] This seems incompatible with principles that emphasise equality before the law, but the *Native Title Act 1993* is one official attempt to overcome this theoretical tension.

**land rights and political language**

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[7] Jane M. Jacobs "The construction of identity" in Jeremy R. Beckett (ed.) *Past and Present - The Construction of Aboriginality* Aboriginal Studies Press, Canberra, 1988, pp31-32.

[8] See for example, Noel Pearson "Mabo: Towards respecting equality and difference" *Voices from the land* (1993 Boyer Lectures) ABC Books, Sydney, 1994, pp.89-101.

While the language of contemporary representations of Aborigines has mostly moved beyond depictions of 'savages' living 'naturally', attempts to balance old and new are sharpened when indigenous rights are based on ongoing cultural relationships to land. This causes contextual problems in historical, anthropological and political language. If ambiguity of language is not identified- if, for example, the term 'settlement' is used without explanation - precision of principles and accord over meanings are wrongly assumed.

A balance of old and new exists also in ideas relating to land and identity that have developed and altered during the history of European imperialism. Particularly challenging is the juxtaposition of contemporary political debate with concepts and theories that have origins in pre-1788 European thought. Discussing the relationship between political and conceptual change, James Farr states

> A political theory of conceptual change . . . must take its point of departure from the political constitution of language and the linguistic constitution of politics. That is to say, its premises must acknowledge that in acting politically actors do things for strategic and partisan purposes in and through language; and that they can do such things because the concepts in language partly constitute political beliefs, actions, and practices. Consequently, political change and conceptual change must be understood as one complex and interrelated process.[9]

This conceptual inquiry does not offer prescriptive solutions. I am principally concerned with how Australian legal and political institutions, and the liberal-democratic principles that underpin them, react to the growing acceptance that indigenous relationships with land are ongoing. Rather than studying the culture or exploring the contact experiences of an Aboriginal community, I

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[9] James Farr "Understanding conceptual changes politically" in Terence Ball, James Farr and Russell L. Hanson (eds.) *Political Innovation and Conceptual Change* Cambridge University Press, Cambridge, 1989, p.32. As Farr argues on p.31 this is different to suggesting that conceptual change reflects political change, "as if the world does it with mirrors".

focus on legal and philosophical aspects of non-indigenous society which constrain rights-based responses. An apparent contradiction emerges of a thesis critical of representations of Aborigines but nonetheless dependent on them. In part, this reinforces the difficulties in connecting rights-based discourse to acknowledgment of indigenous relationships to land. A different piece of research might address the responses and attitudes of indigenous people in Australia to the *Mabo* judgment and debate. In this thesis, I emphasise the importance of understanding how and why liberal-democratic historical perspectives, cultural values and institutions influence the issue of land rights.

As I am most interested in dealing with ideas and concepts, the chapters are cumulative. That is, although they are written as holistic pieces, each new chapter is informed by what comes before. Chapter one summarises *Mabo*, analysing the consequences of the replacement of the doctrine of *terra nullius* with one of native title. I place this new legal development within the existing land rights debate by contrasting the High Court's decision with the 1971 land rights case heard by Justice Blackburn of the Northern Territory Supreme Court, *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia.* More importantly, I expand on the argument that the legal conclusions pronounced by *Mabo* have limited application beyond their narrow context, particularly as the overturning of the doctrine of *terra nullius* relates to sovereignty settlement, which to the Court remains incontrovertible. In particular, the principle of extinguishment of native title places immediate limits on the extent of native title that persists in contemporary Australia.

Chapter two critically discusses the doctrines of native title and *terra nullius* in more depth. Particular attention is paid to the way that theorists such as Locke,

Blackstone, Vattel and Grotius are used in *Mabo* - while the collective legacy of these theorists to liberal-democracy and international law is profound, I argue that to appeal to their works to 'prove' a certain position in relation to contemporary land rights is anachronistic. When legal scholars or historians do so, they reduce their scholarship to the limitations of legal judgments seeking appropriate precedents rather than fullest contexts of explanation. In discussing *terra nullius* as a metaphor for unilateral dispossession, I argue that *Mabo* becomes a new metaphor for the affirmation of appropriation settlement if it is assumed, of itself, to overturn injustice.

Chapter three expands on appropriation settlement through a discussion of land and language. I ask how Australian history, itself open to a vast array of differing perspectives, might respond to ongoing indigenous relationships to land. South Australia contains 'remote' and 'settled' areas - it is used as a repeated example in this thesis, but not as a case study. The colony of South Australia was planned with deliberation. While the notion of progress was a prime ingredient for the experiment, it is also apparent that official intent and colonising practice were not usually in accord. Far from making South Australia unique, this may make the arrival of theory about land more obvious but not more pronounced. Disruption of indigenous relationships to land, and possible extinguishment of native title, occurred incrementally during appropriation settlement. It therefore becomes important to determine how the land is understood when processes of appropriation settlement have occurred. This confounding of the landscape is drawn out through a discussion of the term 'site', meanings of which range from the rigid to the elastic.

Chapter four links contested land with descriptions of Aboriginality, in order to argue that determining indigenous relationships to land leads to questions

being raised about indigenous identity. Determining the 'authentic' Aborigines becomes a political exercise. The term 'traditional' is discussed, and I argue that the simultaneously traditional and contemporary Aborigine, especially living in 'settled' Australia, is a concept not easily acknowledged by the ideas underpinning Australian society.

Chapter five examines elements of the Hindmarsh Island bridge debate, in order to demonstrate that indigenous heritage is a land right, and indeed in 'settled', post-*Mabo* Australia a compelling one. I compare indigenous heritage with pre-*Mabo* land rights legislation relating to the Northern Territory and South Australia. This expands into a discussion of certainty and ambiguity in relation to land rights debate. I argue throughout this thesis that certainty is misleading, and that ambiguity offers more opportunity to acknowledge indigenous relationships to land. However, I also argue that ambiguity allows for the status quo to be maintained, even as alternative voices are more visible, given that in practice unlike in theory concepts have ultimately to be applied and rights must usually compete.

The thesis has a broad chronology - where necessary it moves between the seventeenth and twentieth centuries, but particularly through the nineteenth and twentieth century. Within this I span the land rights debate that roughly equates to the period from Milirrpum in 1971 to the post-*Mabo* period. *Milirrpum* is an arbitrary starting point. Arguments over the recognition of indigenous relationships to land stem back to first colonisation, and a contemporary discussion must engage that historical span. However, when the federal Whitlam Labor government won office in 1972, the outcome in *Milirrpum* suggested the need for a legislative rather than judicial response to indigenous relationships.

This thesis is a contribution to the growing trans-discipline, including anthropologists, historians, geographers, political theorists and legal scholars, who see 'the Aborigine' as 'constructed', 'invented' or 'made'. However, I am most interested in processes that emerge *after* layers of description are shed from people and from land. While external conceptions of 'the Aborigine' move towards some alternative to 'the imagined' we need a temporary route to a political as well as legal acknowledgment of the 'rights' of indigenous peoples to define their cultural identities, whether or not these identities fit pre-conceived images, and whether or not these identities can be readily accommodated by Australian political and cultural institutions. This is a step beyond *Mabo* and the *Native Title Act 1993*. It remains difficult to establish and accept land rights based on indigenous relationships to land also upholding the primacy of the established liberal-democratic nation-state. Indeed, this difficulty may be heightened when indigenous rights are acknowledged in theory.

# Chapter One

## New law - *Mabo* and the doctrine of native title

> If the titles of rule had always to be proved by going back to the seeds of time, no tenure could ever be fully established.[1]

The international law doctrine of *terra nullius* provided the basis for the assumption tha there was no recognisable system of laws or ownership in the colony of New South Wales when Britain assumed sovereignty. Demonstrably, however, Aboriginal and Torres Strait Islander societies existed prior to 1770 when James Cook assumed possession of the east coast, and 1788 when the colony of New South Wales was (pro)claimed. The contingency of technology continues to alter our understanding of the length of indigenous occupation of Australia. As more of Australia is archaeologically surveyed (and as that discipline's technology improves) more thousands of years are attached to the record of human history, currently estimated at around sixty thousand years.[2] Following *Mabo*, legal and political instruments, as well as logic, now acknowledge that the land which became New South Wales was occupied. The notion of blanket, unencumbered European colonisation is repudiated not only by prior occupation of indigenous peoples but also by complex and *ongoing* contact histories since first colonisation.

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[1] Francisco de Vitoria "On the American Indians" *Political Writings* (ed. Anthony Pagden & Jeremy Lawrence) Cambridge University Press, Cambridge, 1991, p.234.

[2] Josephine Flood *Archaeology of the Dreamtime - the story of prehistoric Australia and its people* (1983) 1989, p.16, suggests 40,000 years and that for at least 20,000 years Aboriginal people have lived in every type of environment including penetration of the desert centre. Richard Roberts and Rhys Jones "Luminescence dating of sediments: new light on the human colonisation of Australia" *Australian Aboriginal Studies* No.2, 1994, p.11, suggest that using thermoluminescence (TL) and optical dating methods allows them to date to around 60,000 years in northern Australia.

Debating the *Native Title Bill* in federal Parliament in November 1993, Prime Minister Paul Keating stated that *Mabo* "ended the pernicious legal deceit of terra nullius for all Australia - and for all time."[3] With few exceptions, responses to *Mabo* have accepted the assertion of the majority judgments that they overturned the doctrine of *terra nullius*[4] - although some considered the overturning to be more pernicious than the doctrine.[5] *Mabo* contradicted the 1971 case *Milirrpum v Nabalco Pty Ltd and The Commonwealth of Australia* (*Milirrpum*) in the Northern Territory Supreme Court, where Justice Blackburn's judgment ruled against the recognition of native title by the common law.[6] Great significance has been placed on this judicial shift, not least because legislative recognition of native title followed.

Like *Mabo* and *Milirrpum* this thesis makes use of legal, historical, anthropological, philosophical and political ideas, in the context of indigenous rights to land. Fundamentally, I argue that non-indigenous ideals must be examined more closely in debates over indigenous rights to land. Unlike *Milirrpum* and *Mabo*, however, my objective is not to lose the complexity of the underlying issues by making a 'decision', or arriving at a (supposedly) stable solution. I suggest there is no standard, 'logical' conclusion necessarily to be reached from debating underlying issues relating to the doctrines of *terra nullius* and native title. Subsequently, the legal and political shift it constitutes can lead to vastly different conceptions of the meaning of land in Australia.

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[3] Commonwealth of Australia *Parliamentary Debates (Hansard) House of Representatives* 16 November 1993, Commonwealth Government Printer, 1994, p.2877.

[4] But see Sir Harry Gibbs, foreword to M.A. Stephenson and Suri Ratnapala (eds.) *Mabo: A Judicial Revolution - the Aboriginal Land Rights Decision and Its Impact on Australian Law* University of Queensland Press, St Lucia, 1993, p.xiv, and Bartlett *Mabo Decision - Commentary* p.ix [5.3].

[5] See for example, Ian Hewat *Who made the Mabo mess?* Wrightbooks, North Brighton, 1993, especially pp.1-14 and 65-76; Colin Howard "The Mabo Case" *Adelaide Review* February 1993, pp.8-9; Ian McLachlin "Mabo: the dividing of our nation" *Advertiser* 10 November 1993, p.15.

[6] *Milirrpum and Others v. Nabalco Pty. Ltd. and the Commonwealth of Australia* 17 Federal Law Reports 141.

Meaning of land in Australia is partisan. It is framed by the confines of property law, but also by perceptions of what it means to use the land, and therefore who should have access. Such meanings are all apparently based on a logical delineation of the 'facts', but each also stem from particular epistemological positions. In this context, it is conceptually non-confrontational to presuppose that *Mabo*'s repudiation of *terra nullius*, confirmed by the *Native Title Act 1993*, of itself powerfully executes change.[7] Such a simplification leads to the doctrine remaining active *because* it is perceived to be relegated to history.

This chapter introduces the content and context of *Mabo*, but from a conceptual rather than intricately legal perspective. Indeed, in preferring an approach not confined by legal limitations, the discussion of the doctrines of *terra nullius* and native title argues that liberal-democratic theories and institutions must confront the complexities of indigenous rights in the context of their own epistemological bases.

**from *terra nullius* to native title**

The island of Mer, one of three known as the Murray Islands in the Torres Strait, was the subject of *Mabo*. Mer, like other islands in the Torres Strait, was annexed to Queensland in 1879 (Queensland having become a separate colony in 1859). The Meriam people are of Melanesian rather than Aboriginal descent, and before European contact were gardeners rather than hunter-gatherers. In *Milirrpum*, land in northeast Arnhem Land on the Gove Peninsula was the subject of conflicting

[7] See for example Sandra Pannell "Mabo and Museums: 'The Indigenous (Re)Appropriation of Indigenous Things'" *Oceania* Vol.65, 1994, pp.19-20.

claims by the bauxite mining company Nabalco, and the Yolgnu people, particularly the Rirratjingu and Gumatj 'clans'. The land fell within the territory claimed by Captain Phillip as New South Wales in 1788.

In *Mabo*, Brennan is concerned to alter the common law so it is not "seen to be frozen in an age of racial discrimination".[8] Whatever the historical justifications advanced to suggest that indigenous peoples in settled colonies possessed no rights and interests in the land, "an unjust and discriminatory doctrine of that kind can no longer be accepted".[9] In direct contrast to Blackburn, Brennan finds that the 'legal fiction' inherent in the doctrine of *terra nullius* is contrary to "international standards and to the fundamental values of our common law".[10] Some commentators argue this is indicative of the High Court's heightened 'activism' and 'centralism'.[11] This criticism is based on legal positivism, and follows H.L.A. Hart's argument on the merits of separating "the law that is from the law that ought to be".[12] In this context, the majority in *Mabo* aligned more closely with Hart's protagonist, Lon L. Fuller, who preferred an idea of law as striving towards a moral social order.[13]

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[8] *Mabo and Others v State of Queensland* High Court of Australia (1992) 107 *Australian Law Reports* 1, (Brennan) at 28.
[9] *ibid.* at 28, 29.
[10] *ibid.* at 29.
[11] See for example, Gabriel A. Moens "Mabo and Political Policy-Making by the High Court" in Stephenson and Ratnapala, pp.49-55; The Hon. Peter Connolly, CBE, QC "Should the Courts Determine Social Policy" in Association of Mining & Exploration Companies (AMEC) *The High Court of Australia in Mabo* Papers delivered to the Samuel Griffith Society, AMEC, Leederville, 1993, passim; S.E.K. Hulme, AM, QC "Aspects of the High Court's Handling of Mabo" in AMEC, pp.25-26, defines "judicial restraint" in the High Court as making a Constitutional ruling only when a case cannot be determined by "the facts".
[12] H.L.A. Hart "Positivism and the separation of law and morals" *Harvard Law Review* Vol.71, 1958, p.606.
[13] Lon L. Fuller "Positivism and fidelity to law - a response to Professor Hart" *Harvard Law Review* Vol.71, 1958, especially pp.606-615.

In *Milirrpum*, Blackburn accepts that the Yolgnu people possessed organised political structures prior to occupation:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.[14]

However, in finding that the Australian common law must look beyond the fact of Yolngu law, Blackburn espouses a legal positivist position in which *terra nullius* is an active, ongoing sovereign doctrine rather than a mere consignment of colonisation. The *Mabo* decision is *one* consequence of a sustained period of debate and change that has occurred since *Milirrpum*. It challenges *Milirrpum*'s notion that no indigenous land rights existed post-colonisation, instead identifying a doctrine of native title based on a principle of ongoing traditional attachment.

In an Australian legal context *terra nullius* is a fixed device of international law, determining not whether but *by what means* Britain established sovereignty. In the late eighteenth century and into the nineteenth century, the relevance of *terra nullius* for the Australian colonies related to potential rival colonisers from Europe, notably the French, more so than with certifying the dispossession of indigenous inhabitants.[15] Moreover, "the instruments of nineteenth century British supremacy - commercial dominance, naval power and missionary zeal"[16] should be placed alongside potential legal theory and humanitarian intent in discussions on the

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[14] *Milirrpum* at 267.

[15] Sir Ernest Scott "Taking Possession of Australia - The Doctrine of "Terra Nullius" (No Man's Land)" *Royal Australian Historical Society Journal and Proceedings* Vol.XXVI, Pt.1, 1940, pp.1-2, 10-17; Elizabeth Evatt "The Acquisition of Territory in Australia and New Zealand" in C.H. Alexandrowicz (ed.) *Grotian Society Papers* Martinus Nijhoff, the Hague, 1968, pp.28-34.

[16] P.J. Marshall and Glyndwr Williams *The Great Map of Mankind - British Perceptions of the World in the Age of Enlightenment* J.M. Dent, London, 1982, p.2.

treatment of indigenous peoples during the imperialist era. In the late twentieth century, *Mabo* confirms the acquisition of sovereignty by settlement, a legal fact which some indigenous people continue to challenge.[17]

Literally, *terra nullius* means "no person's land", that is, land belonging to no-one.[18] One legal dictionary relates this to the era of European imperialism as "territory belonging to no state, that is, territory not inhabited by a community with a social and political organisation".[19] Present within this definition is an issue that has frequently been the subject of tendentious and inconclusive legal debate - whether the doctrine applied not only to literally unoccupied territory but also to "territory inhabited by relatively uncivilised native tribes".[20] Certainly, the perceived rights of 'primitive' peoples altered during the nineteenth and into the twentieth century.[21] It is apparent, for example, that the use of the doctrine of *terra nullius* in an 1889 appeal to the Privy Council, *Cooper v. Stuart*, reflects contemporary thought on the level of 'development' of the Australian Aborigine as well as certain legal conclusions. Australia became *terra nullius*, as the High Court conceded in State of Western Australia v Commonwealth:

> in *Cooper v Stuart*, New South Wales was described as a "tract of territory practically unoccupied, without settled inhabitants or settled law". Clearly enough, occupation by Aborigines was disregarded. The Aborigines and

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[17] For example, see Paul Coe "The Struggle for Aboriginal Sovereignty" *Social Alternatives* Vol.13, No.1, April 1994, pp.10-12; Michael Mansell "Towards Aboriginal Sovereignty: Aboriginal Provisional Government" *Social Alternatives* Vol.13, No.1, April 1994, pp.16-18. Post-*Mabo* the High Court reaffirmed that sovereignty was legally incontestible, see *Coe v Commonwealth* 118 ALR 193 (Mason CJ) at 199-207.

[18] Alan Frost "New South Wales as Terra Nullius: The British Denial of Aboriginal Land Rights" *Historical Studies* October 1981, p.513.

[19] *CCH Macquarie Concise Dictionary of Modern Law* CCH Australia Ltd., North Ryde, 1988, p.129.

[20] Evatt, p.17. John McCorquodale *Aborigines: A History of Law and Injustice 1829-1985* PhD thesis, University of New England, 1985, p.47, states that "desert and uncultivated" has "always" been taken as such.

[21] M.F. Lindley *The Acquisition and Government of Backward Territory in International Law* Longmans, Green & Co., London, 1926, pp.10-23; Evatt, p.17.

> their interests in the land were not acknowledged. The territory was, for the purposes of the law governing the relationships between the Crown and the settlers, treated as though it were "desert uninhabited". Or, to use the more familiar phrase of international law, "terra nullius".[22]

This chapter does not engage in this legal debate, which I suggest must remain inconclusive in order to reflect accurately the different ways with which the doctrine of *terra nullius* has been employed since the seventeenth century. However, I do examine the way in which *Mabo* (in contrast with *Milirrpum*) formulates certain conclusions.

The influential English jurist William Blackstone's work *Commentaries on the Laws of England* first appeared in 1767. It included a statement of judicial and administrative developments regarding laws of empire, which codified a direction that had been emerging in the English legal system since the early seventeenth century, but also built on the basis set down by Emmerich de Vattel's *The Law of Nations* (1758). Blackstone set down and became a recognised authority on the distinction between colonies that were settled as against conquered or ceded, and was discussed in both *Milirrpum* and *Mabo*.[23] By the mid-eighteenth century, territories not under dominion of a European state, sovereignty could be acquired in one of three ways; conquest, cessation, or settlement, that is, "by unilateral possession, on the basis of first discovery and effective occupation".[24] Blackstone's statement that the distinction was "founded on the law of nature or at least the law

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[22] *State of Western Australia v Commonwealth* 128 ALR 1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) at 15.

[23] For legal summaries of the emergence of the doctrine of *terra nullius* see Evatt, pp.16-19, and Alex Castles *An Australian Legal History* Law Book Co., Sydney, 1982, pp.7-17.

[24] Frost, p.514; Hulme, p.33 states, "Governments *told* the courts what places England ruled. Common law governed the *results* of acquisition, and it was for that purpose that common law made its classification of the various modes of acquisition." His emphases.

of nations" takes account of the argument that land became property through cultivation, as Locke argued, and that this principle was being incorporated into the emerging law of nations by Vattel and others.[25]

Blackstone's statement has been adopted by both Australian and British courts as authoritative confirmation of New South Wales as *terra nullius*.[26] In *Milirrpum* Blackburn stated "I must regard as of some significance the fact that there is no trace of any doctrine of communal native title in Blackstone's *Commentaries*".[27] Blackburn dismissed either the possibility that Blackstone made a significant error of omission, or that the doctrine of native title did not exist in 1765 but was established in 1788. He concluded that the doctrine of "communal native title" could not apply in territory deemed *terra nullius* because no such doctrine was a part of the law of England.[28] Therefore, although he found that the Yolgnu evidence revealed an indigenous "system of law" his decision rested purely on the convention of the common law and his incapacity to overturn that.[29]

In particular, Blackburn cited the 1889 decision on appeal to the Privy Council in *Cooper v Stuart*. Lord Watson's judgment found that the colony of New South Wales belonged to the category of settled colonies and was therefore subject to the imposition of the common law. It was, Lord Watson found,

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[25] William Blackstone *Commentaries* 18th ed, 1821, Book 1, p.111; Frost, fn.5, p.515, notes that, "By their attitudes, the eighteenth century commentators show that Locke was a central influence, and it is therefore convenient to use his statements to set forth the amalgam. In certain important respects, however - especially the distinction between the states of nature and society - the eighteenth century view diverted sharply from Locke's."
[26] Castles p.11.
[27] *Milirrpum* at 206.
[28] *ibid.* at 206-208.
[29] *ibid.* at 268.

> a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.[30]

To Blackburn, Lord Watson's conclusion in *Cooper v Stuart* was "an authority which is clear and, as far as this Court is concerned, binding".[31] Writing a century after *Cooper v Stuart*, in advocation of the legal validity of native title, the legal scholar Kent McNeil is unconvinced by Lord Watson's conclusions of a distinction between territories with and without established systems of law. McNeil questions Lord Watson's - and by extension Blackburn's - affirmation of settled law:

> If the customary practices of the Australian Aboriginals did not qualify as settled law, was this because they were not laid down by persons in authority or enforced by institutions, or because they lacked a reasonable degree of certainty? Or was there some other reason? Though these difficult anthropological and jurisprudential issues were implicit in his settled law approach, Lord Watson did not address them. Moreover, he apparently reached his conclusion - that New South Wales was settled because it lacked an established system of law - without any evidence respecting the nature of Aboriginal society, no doubt because he regarded the matter as already closed. [32]

Settlement was seen as applicable in indigenous societies so 'primitive' that negotiation with them was deemed impossible. Determination of what constituted 'primitive' was observable, and in the late eighteenth century referred mainly to a combination of political structures and familiar use of land. Emerging "four stages

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[30] J.M. Bennett and Alex C. Castles *A Source Book of Australian Legal History - Source Materials from the Eighteenth to the Twentieth Centuries* Law Book Company Ltd, Sydney, 1979, p.287.
[31] *Milirrpum* at 242-244.
[32] Kent McNeil *Common Law Aboriginal Title* Clarendon Press, Oxford, 1989, p.122.

theory" suggested a progression through four stages of human subsistence: hunting-gathering, shepherding, agriculture and commerce.[33]

Early European depictions of indigenous people in America and Australia had political utility. Pagden suggests "It was colonisation which forced the 'savage' and the 'barbarian', and with them the problem of the intelligibility of other worlds, fully upon the European consciousness". [34] When Joseph Banks testified before the Committee on Transportation in 1785[35] he stated that there were few inhabitants who would "speedily abandon" the coast and indicated no knowledge of an Aboriginal language or system of government. When asked "Do you apprehend, in Case it was resolved to send Convicts there, any District of the Country might be obtained by Cession or purchase?" he replied

> There was no possibility while we were there of obtaining any thing either by Cession or purchase as there was nothing we could offer that they would take except provisions and those we wanted ourselves.[36]

Henry Reynolds interprets Banks evidence to suggest although the territory was not *terra nullius*, it could become so if the lands were abandoned. Instead, Reynolds continues, the Aborigines resisted, "thereby emphasizing their sense of

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[33] See Ronald L. Meek *Social Science and the Ignoble Savage* Cambridge University Press, Cambridge, 1976, especially chapter five; Glyndwr Williams "Seamen and Philosophers in the South Sea in the Age of Captain Cook" *The Mariner's Mirror* Vol.65, 1979, p.10, pp.12-15; Istvan Hont "The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the 'Four-Stages Theory'", in Anthony Pagden (ed.) *The Languages of Political Theory in Early-Modern Europe* Cambridge University Press, Cambridge, 1987, pp.253-254.

[34] Anthony Pagden *European Encounters with the New World - From Renaissance to Romanticism* Yale University Press, New Haven and London, 1993, p.13; J.G.A. Pocock "Tangata Whenua and Enlightenment Anthropology" *New Zealand Journal of History* Vol.26, No.1, April 1992 pp.28-53.

[35] It is beyond this thesis to discuss the influences on Cook and Banks in the formation of their respective views on Aborigines in 1770, but see Glyndwr Williams "'Far more happier than we Europeans': reactions to the Australian Aborigines on Cook's voyage" *Historical Studies* Vol.19, No.77, October 1981, pp.499-512.

[36] Robert J. King "Terra Australis: Terra Nullius aut Terra Aboriginum?" *Journal of the Royal Australian Historical Society* Vol.72, Pt. 2, October 1986, p.77. See also *Mabo* (Deane & Gaudron) at 74; Alan Frost *Convicts and Empire A Naval Question 1776-1781* Oxford University Press, Melbourne, 1980, p.39.

property and creating legal problems which Australian courts are only now coming to terms with".[37] In *Mabo*, Deane and Gaudron respond to the challenge:

> In fact, it is now clear that parts of the continent were, for an industrialised and uncultivated territory, quite heavily populated. If one must speculate, the most likely explanation of the absence of specific reference to native interests in land is that it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals.[38]

In any case Brennan rejects the idea that Aborigines were without law:

> The facts as we know them do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory.[39]

Noting the role played by assumptions that accompanied *terra nullius*, Deane and Gaudron argue that "The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."[40]

McNeil concedes in a footnote that the question of tribal societies possessing 'law' was not seriously raised until the twentieth century[41] when anthropologists became gradually more aware of the complexity of indigenous relationships to land.[42] This is different to the question of Aboriginal rights under British law,

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[37] Henry Reynolds *The Law of the Land* Penguin, Ringwood (1987) 1992, p.54.
[38] *Mabo* (Deane & Gaudron) at 74.
[39] *ibid.* (Brennan) at 26.
[40] *ibid.* (Deane & Gaudron) at 82.
[41] McNeil, p.122, fn.59.
[42] See L.R. Hiatt's introduction to his edited volume *Aboriginal Landowners - Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* Oceania Monograph No.27, University of Sydney, 1984, p.1.

which Reynolds has shown was a matter for considerable debate.[43] In any case, McNeil's point highlights a critical dilemma that Watson and Blackburn avoided. As the land which became New South Wales was *terra nullius*, it was deemed to possess no settled law. The common law of England therefore became the common law of the colony. An important issue arising from this was the extent to which indigenous people were subject to British and colonial law. In conquered territories, local laws and customs, insofar as they were not unconscionable or incompatible with a change in sovereignty, remained in force until altered or replaced by the Crown. In settled territories, English law accompanied the colonists to the extent it was applicable to local circumstances.

While Blackstone stated that in new settled colonies "all the English laws then in being . . . are immediately there in force", he also emphasised that this statement was to be "understood with very many and very great restrictions".[44] This equivocal proviso is prevalent in contemporary Australia, both in the competition to 'correctly' interpret history, and in reconciling the contemporary version of equality that views distinctive rights for indigenous people as a challenge to the principle of equal treatment for all citizens. In *Milirrpum* Blackburn avoided the implications of this by providing certainty via legal positivism. If *Mabo* overturns this certainty, what are the potential consequences? What recognition is there of accentuated political variances that emerge from adding the doctrine of native title to the principles of property law and the certainty of state sovereignty?

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[43] Reynolds, chapter four (and see chapter three of this thesis).
[44] Blackstone, p.111; Castles, p.11; McNeil, pp.113-115.

What the doctrine of native title does in an Australian context is to add a new theoretical right, but to leave unanswered complexities that accompany that right. According to Brennan in *Mabo*,

> Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[45]

Native title may be extinguished "by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title".[46] Native title may also be partially extinguished, allowing certain usufructuary rights to remain, or native title may 'co-exist' with another right to land. This base definition is then subject to a complex arrangement of regulations under the *Native Title Act 1993* which determine the persistence, extinguishment or partial extinguishment of native title. The Act states

> The expression **"native title"** or **"native title rights and interests"** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.[47]

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[45] *Mabo* (Brennan) at 42.
[46] *ibid.* at 51.
[47] *Native Title Act 1993* (Cth) s.223.(1).

A key phrase through which to explore further the definition of native title is 'ongoing traditional attachment'. This phrase links indigenous culture and ideas about land - as well as secondary interpretations of these - to a political scenario for the determination of indigenous rights to land. If ongoing traditional attachment cannot be demonstrated under the established tribunal system, native title is deemed to be extinguished. In this context, the High Court's judicial ability to overturn *terra nullius* has limited capacity to enact change. If the doctrine of *terra nullius* was a convenient legal lie, then similarly its formal overturning may conveniently bypass historical and political issues relating to indigenous land rights issues.

The legal fiction of *terra nullius* is manifested in what Reynolds terms a 'conflation' of meanings. These, he suggests, represent the source of the obstructive powers of *terra nullius*:

> It means both a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all, where no tenure of any sort existed.[48]

In his influential work, *Common Law Aboriginal Title*, Kent McNeil provides perhaps the clearest enunciation of the pro-native title position which emerges from identifying this distinction.[49] The fundamental political point McNeil makes is that once sovereignty is established over a territory, "the authority of the Crown is defined and limited by the law"; in terms of indigenous occupation of the land, there is a vital distinction between territorial sovereignty and title to land.[50]

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[48] Reynolds, p.12.
[49] Toohey's judgment in *Mabo* is influenced by McNeil's thesis, see especially *Mabo* (Toohey) at 139; at 61, fn.174 Deane and Gaudron call *Common Law Aboriginal Title* a "landmark" work.
[50] McNeil, p.2, pp.108-133.

A body of legal thought argues that if New South Wales was legally *terra nullius*, then the adopted English common law became the law for the colony, not just for the colonisers. While the judgment in *Cooper v. Stuart* indicates that this need not lead to native title, it is further suggested that indigenous peoples within colonial boundaries became British subjects. They therefore possessed proprietary rights to the land they continued to occupy, which the Crown was obliged to protect as it would for its other subjects.[51]

The preamble to the *Native Title Act 1993* recognises native title as based on cultural attachment, and reaffirms the principle of valid extinguishment.[52] The apparent potential power of native title exists within the qualifying context that it is a connecting legal mechanism, a necessity of the common law rather than of indigenous culture. Moreover, while extinguishment is identified as occurring from valid government acts inconsistent with persisting native title, in particular the granting of alternative title to land, native title is more broadly impeded by the history of colonisation and the development of the liberal-democratic nation-state. *Mabo* and the *Native Title Act 1993* reject the doctrine of *terra nullius*, but not the consequences of historical discrimination that has resulted in dispossession or partial dispossession.

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[51] Examples of this body of legal thought include Barbara Hocking *Native Land Rights* thesis for LL.M, Monash University, December 1970, pp.3-14, 134-163, prior to *Milirrpum*; Geoffrey Lester and Graham Parker "Land Rights: the Australian Aborigines Have Lost a Legal Battle But..." *Alberta Law Review* Vol.11, No.2, 1973, pp.189-237, replying to *Milirrpum*; Frank Brennan *Sharing the Country* Penguin, Ringwood, 1992, pp.25-27, immediately prior to *Mabo*.

[52] *Native Title Act 1993* (Cth) preamble, p.2.

**sovereignty and land rights**

In *Mabo*, Brennan makes a fundamental distinction between the acquisition of territorial sovereignty, the province of international law, and acquisition of property, the province of the common law, thereby confirming the possibility of proprietary rights for indigenous peoples who maintain a connection with the land.[53] This basis for native title also serves two purposes vital to a comprehensible and palatable legal judgement. Firstly, it allows Brennan to re-affirm the unquestionable sovereignty of the Crown, so as not to "fracture the skeleton of principle which gives the body of our law its shape and internal consistency".[54] Secondly, with sovereignty apparently intact, he rejects the Crown's beneficial title to the land (a legacy of the English system of tenure) without fracturing Australian property law - the Crown maintains radical title, which is "quite consistent" with recognition of native title to land. Indeed, he states, "It is arguable that universality of tenure is a rule depending on English history and that the rule is not reasonably applicable to the Australian colonies".[55]

As Hughes and Pitty suggest, Brennan replaces discarded legal 'fiction' with the idea that the "common law supposedly protected indigenous land rights after 1788, while sovereign governments did not".[56] This different 'legal fiction' might be seen as laying a new set of foundations *over* a complex combination of legal, historical and social elements. The recognition of native title is one way of attempting to acknowledge indigenous relationships to land, and of finding a

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[53] *Mabo* (Brennan) at 18-20.
[54] *Mabo* (Brennan) at 19, 29; *Coe v Commonwealth* (1993) at 200.
[55] *Mabo* (Brennan) at 32.
[56] Ian Hughes and Roderic Pitty "Australian colonialism after Mabo" *Current Affairs Bulletin* June/July 1994, p.15.

regime by which land rights might be acknowledged. At the same time, the foundations allow movement forward despite complexity that exists in so many legal, historical and social forms that it could, if allowed, inhibit any progress. However, avoiding the complexity does not eradicate it. Aspects of it have emerged, and will continue to emerge in the deliberations of the National Native Title Tribunal.

In part, native title is an attempt to accommodate ongoing indigenous relationships to land into the Australian system of land ownership. In the context of land rights, Graham Maddox's idea of the state is relevant:

> The state itself is a common enterprise, an association supreme and all-embracing. Our membership is our citizenship.[57]

Such an ideal requires an idea of sovereignty as the state's "foundational unity":

> Besides individuals and group interests, there must indeed be a *common good* which overrides the claims of other associations, otherwise the state would disintegrate.[58]

Maddox's view is based on the affirmation of state sovereignty, but just as native title does not challenge sovereignty, neither can resort to its principles assist when within the "common good" identified, there remain sub-groups and disagreement over the respective rights which ought to make up that common good.[59] Concepts of the "common good" can be employed both to support and to oppose land rights.

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[57] Graham Maddox *Australian Democracy in Theory and Practice* Longman Cheshire, Melbourne (1985) 1991, p.27.
[58] *ibid.* p.162.
[59] Brian Barry "Is Democracy Special?" *Democracy, Power and Justice - Essays in Political Theory* Clarendon, Oxford, 1989, p.35.

The Meriam people were traditionally gardeners, while the Yolgnu were hunter-gatherers. By taking a legal approach that attempts to transcend this distinction, Brennan moves in a distinctly different direction to that set down by Blackburn in *Milirrpum*. To do so, Brennan relies particularly on the Commonwealth *Racial Discrimination Act 1975*, which was the federal Whitlam ALP government's legislative ratification of the *International Convention on the Elimination of all Forms of Racial Discrimination*. The Act states

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State of Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons or another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.[60]

Therefore, if gardeners are entitled to native title, so are hunter-gatherers. However, Brennan is unable to alter the colonising history of Australia, and therefore finds it is possible that certain activity extinguished native title. The *Racial Discrimination Act* becomes a cut off point for when indigenous peoples, due to their race, can have their legitimate title to land illegitimately extinguished.

By using concepts of international human rights integrated into domestic law by the *Racial Discrimination Act*, Brennan is still concerned to position an alternative precedent to bolster his judicial originality. To do so, he quotes a portion of

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[60] *Racial Discrimination Act 1975* (Cth) with amendments, s.10(1) in reference to Article 5 of the Convention.

Blackstone's statement on colonies expressing ambivalence over the practice of colonisation:

> so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.[61]

Although recognising that "desert and unoccupied" potentially includes territory in which the indigenes lived without recognisable social structures[62], Brennan notes Blackstone's "misgivings" and indeed states that they "found a resonance in international law after two centuries" in the International Court of Justice's *Advisory Opinion on Western Sahara.*[63]

In 1975, the International Court found that Western Sahara at the time of colonisation by Spain in 1884 was not *terra nullius.*[64] Brennan notes further the Court's finding that at the time, State practice of the relevant period (that is, 1884, a century after the common law was first attached to New South Wales) was not to find such territory as *terra nullius.* Indeed, he states, Judge Ammoun, Vice-

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[61] Blackstone *Commentaries on the Laws of England* Bk II, Ch 1, 17th ed., 1830, p.7, quoted in *Mabo* (Brennan) at 22.
[62] *Mabo* (Brennan) at 22-24.
[63] *ibid.* at 22. See also Barbara Hocking "Colonial laws and indigenous peoples: Past and present law concerning the recognition of human rights of indigenous native peoples in British colonies with particular reference to Australia" in Barbara Hocking (ed.) *International law and Aboriginal Human Rights* Law Book Company, Sydney, 1988, p.8, and Rosalie Balkin "International law and sovereign rights of indigenous peoples" in Hocking (ed.) pp.24-25.
[64] *Advisory Opinion on Western Sahara* [1975] 1 *International Court of Justice Reports* 12. Western Sahara refers to the state, *Western Sahara* to the case.

President of the Court, delivered a separate opinion in which he condemned the concept of *terra nullius* as applying to an inhabited territory, noting that Vattel, "defined terra nullius as a land empty of inhabitants".[65]

Notwithstanding Ammoun's separate judgement, which provided a legal precedent for Brennan to condemn *terra nullius*[66], three other judges argued that the International Court was not competent to consider the matter before it.[67] More importantly, the majority finding found two essential reasons why the Court ruled that Western Sahara was not *terra nullius*. First, the Court found that although the indigenous people of Western Sahara were nomads, they nevertheless possessed a recognisable social and political organisation.[68] Second, in 1884 Spain did not proceed at the time on the basis of *terra nullius*, but rather claimed to enter into agreements with the chiefs of local tribes. [69]

The primary importance of an advisory opinion of the International Court is to provide legal advice to the UN organ which requests it.[70] In the case of *Western Sahara*, the UN General Assembly's resolution 3292 reaffirmed "the right of the population of the Spanish Sahara to self-determination" - that is, its right to form an independent nation-state, although neither the resolution nor the advisory

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[65] *Mabo* (Brennan) at 22; *Western Sahara* (Ammoun) at 103.
[66] Gerry Simpson "*Mabo*, international law, *terra nullius* and the stories of settlement: an unresolved jurisprudence" *Melbourne University Law Review* Vol.19, June 1993, p.207.
[67] *Western Sahara* (Gros) at 91-92, (Petren) at 125-130, (Dillard) at 134. While *Mabo* consists of separate judgments, with Brennan's being the 'leading' judgment, *Western Sahara* contains a generic "majority finding" followed by individual "declarations" and "separate opinions".
[68] *Western Sahara* at 56.
[69] *ibid.* at 56. See also Connolly, pp.16-18.
[70] Judge Nagendra Singh *The Role and Record of the International Court of Justice* Martinus Nijhoff, Dordrecht, 1989, p.26. (Judge Singh was a Judge of the ICJ from 1973 and President from 1985-88.)

opinion resolved the political struggle over the territory.[71] Conversely, *Mabo* was adamant that although proprietary rights at common law were at issue, existing sovereignty was incontestable.

Brennan thus absolves himself from the unpalatable legal fiction of *terra nullius* but remains constrained by a combination of legal and historical factors. He is necessarily compelled not to challenge sovereignty, and in the process affirms the acquisition of sovereignty by settlement based on occupation. Simpson argues that a new method of acquisition is created "combining the symbolism of one (occupation) with the consequences of another (conquest)".[72] He argues that the theory of acquisition can only remain "comprehensible" by declaring Australia a conquered territory.[73]

However, histories of appropriation settlement suggest that native title has been extinguished or 'partially extinguished' across much of what is now Australia, a truism that by Brennan's own argument is a separate restriction from the loss of sovereignty. While the Act provides the opportunity for Brennan to (spuriously to some)[74] find that hunter-gatherers are as entitled to native title as cultivators, it remains true that it is far easier for the Meriam people to avoid extinguishment of their title.[75] In this context, Simpson's proposal of sovereignty by conquest contributes to an unresolvable legalistic point, but is removed from a practical discussion of the concept of contemporary Australian relationships to land.

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[71] The text of UN Resolution 3292 (XXIX) is set down in full in *Western Sahara* at 30-31; Bruce Maddy-Weitzman "Conflict Resolution in Northwest Africa? The UN and the Western Sahara" *Asian and African Studies* Vol.26, 1992, pp.133-151, passim.
[72] Simpson, p.208.
[73] *ibid.*
[74] See for example Hulme, pp.48-49.
[75] R.D. Lumb "The Mabo Case - Public Law Aspects" in Stephenson and Ratnapala, p.5.

The legal regime governing extinguishment of native title, based on the principle that past Commonwealth acts are valid[76], is still being established. In *Mabo*, Brennan states that Crown sovereignty carries with it "the power to extinguish private rights and interests in land within the Sovereign's territory" but the exercise of this power "must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive".[77]

In ruling that the Waanyi people could not proceed with their native title claim for an area of land around 250 kilometres north west of Mount Isa in Queensland, Justice French of the National Native Title Tribunal stated that "plain and clear intention" does not require demonstration of "existence of an actual intention to extinguish native title".[78] In ruling against the Waanyi, French concluded

> The process must seem perverse to those who maintain their association with their country and upon whom indigenous tradition confers responsibility for that country. The operation of past grants of interests to irrevocably extinguish native title, regardless of the current use of the land, reflects a significant moral shortcoming in the principles by which native title is recognised.[79]

Therefore, *Mabo* implies that the greater the historical dispossession, the less are the subsequent rights, and French's ruling is indication that any "moral shortcoming" is beyond his jurisdiction. A legal positivist might argue that,

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[76] *Native Title Act 1993* (Cth) s.14(1) - 15(2).
[77] *Mabo* (Brennan) at 46.
[78] French J *In the matter of the Native Title Act 1993, and In the Matter of the Waanyi Peoples Native Title Determination Application* Application QN94/9 in the National Native Title Tribunal, Perth, 14 February 1995, at 23. See also *Mabo* (Brennan) at 49.
[79] *ibid.* at 70.

whatever legal and metaphorical shifts have occurred, this indicates that *Milirrpum* reflects the reality of the law that *Mabo* still reflects.[80] Here, 'extinguishment' can be seen as an indicator of the amount of non-indigenous use of the land, and the degree to which that latter land use can *accommodate* indigenous relationships to land. Clearly, legal extinguishment is influenced by anthropological and historical determinations over land and identity, but it is vital to recognise that a loss of native title is not the same as a loss of ongoing relationships to land.

Both *Mabo* and the *Native Title Act 1993* consciously uphold the *Racial Discrimination Act 1975*. The *Racial Discrimination Act 1975* affords Aborigines the same rights as other citizens, and allows for a temporary special measure to reverse disadvantage due to race. The effect of recognising native title is to afford Aborigines the same rights as other citizens. However, native title is a legal term based on anthropological interpretations of systems of law that are *different*. Granting indigenous people a right to land that has a legal name does not necessarily mean that indigenous comprehensions of land will fit any more comfortably into the existing construct of Australian property law.

In avoiding the proclamation of a sovereign self-determination, as occurred with Western Sahara, a new domestic idea of self-determination emerges. As Robert Young argues, "anti-colonialism" in various forms is not new - rather, what has emerged since World War Two has been the decolonisation of European Empires, accompanied by the decolonisation of European thought and forms of history.[81] However, self-determination for indigenous minorities within established liberal-

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[80] For example, see R.D. Lumb "The Mabo Case - Public Law Aspects" in Stephenson and Ratnapala, p.5,21.

[81] Robert Young *White Mythologies - Writing History and the West* Routledge, London and New York, 1990, p.119.

democratic nation states is not decolonisation, or at least it is a new and as yet undefined level of decolonisation.[82] Following the *Mabo* judgment, George Mye, an ATSIC representative from Darnley Island in the Torres Strait, stated

> I'm overjoyed. We want to be part of Australia, but we want autonomy.[83]

Paragraph 4 Article 1 of the *International Convention on the Elimination of all Forms of Racial Discrimination* states

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance or separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[84]

In post-*Mabo* negotiations over appropriate legislative responses to the recognition of native title by the common law, indigenous negotiators relied on the *Racial Discrimination Act*, while at one point the federal government was considering suspending the Racial Discrimination Act in order to validate post-1975 leases.[85] Indeed, the entire *Native Title Act 1993* is a "special measure" under the *Racial Discrimination Act 1975*, and is also intended "to further advance the process of

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[82] See for example, Bev Blaskett, Alan Smith and Loong Wong "Guest Editors' Introduction: Indigenous Sovereignty and Justice" *Social Alternatives* Vol.13, No.1, April 1994, pp.5-7. But see Russel L. Barsh "Indigenous peoples and the right to self-determination in international law" in Hocking (ed.), suggesting that the apparent conflict between self-determination and 'equality' is superficial, pp.72-73.

[83] *Age* 4 June 1993, p.1.

[84] *International Convention on the Elimination of all Forms of Racial Discrimination Racial Discrimination Act* Schedule, p.44.

[85] Johanna Sutherland "The Law and Politics of Rights, and Native Title" *Pacific Research* November 1993, p.7; Frank Brennan *One land one nation: Mabo - towards 2001* University of Queensland Press, St Lucia, 1995, chapter two.

reconciliation among all Australians".[86] The process of determining the legal persistence of native title is set out in the Act. However, that process is different to determining how far "special measures" should go, or when they should cease because their objectives have been reached. Indeed, how can a "special measure" of this nature end?

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Questions raised towards the end of this chapter lead more broadly into issues relating to the potential influence of international forums such as the United Nations and the International Labour Organisation. An examination of such factors is beyond the scope of this thesis, except that the above discussion on the *Racial Discrimination Act* is an indication of such influence when accompanied by governments *choosing* to legislate, and *choosing* to interpret and act on legislation.

Conceiving of and responding to the doctrine of native title requires both legal and political input. However, there will be tensions *within* aspects of non-indigenous thought, as well as within indigenous thought and between indigenous and non-indigenous. Native title may be a dramatic new approach to land rights, but Australian historical and contemporary perceptions of the land must be incorporated into any considered response to the challenge presented by ongoing indigenous relationships to land.

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[86] *Native Title Act* preamble, p.3.

## Chapter two

## Contexts of native title and *terra nullius*

One way to observe the complexity of land rights in Australia is to locate the emergence of native title in historical and conceptual contexts. Attention to context emphasises the importance of interpreting ideas, and definitions which emerge from discourse, in the circumstances in which they were written.[1] In doing so, this augments but does not replace an approach that seeks to understand ideas from influences and sources used in texts. Moreover, it explicitly challenges anachronistic tendencies, in particular the retrospective assigning of political opinion over issues not yet canvassed.[2] Such a discussion is political as well as historical:

> Both the past and the future of a text viewed historically furnish us with the grounds for emphasising the diversity and heterogeneity of the utterances it may be performing or may turn out to have performed. To the political theorist, this means that the language of politics is inherently ambivalent . . .[3]

Native title is necessarily ambiguous, as the *Native Title Act 1993* is prepared to consider its content on a case by case basis. Indeed, while native title can be extinguished, it may adapt to differing circumstances, and may co-exist with other rights.

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[1] See Quentin Skinner "Language and political change" in Terence Ball, James Farr and Russell L. Hanson (eds.) *Political Innovation and Conceptual Change* Cambridge University Press, Cambridge, 1989, p.8, on the difference between the history of the word *originality* and the history of the concept of originality.

[2] See Anthony Pagden's Introduction to his edited volume *The Languages of Political Theory in Early Modern Europe* Cambridge University Press, Cambridge, 1987, especially pp.1-3.

[3] J.G.A. Pocock "The concept of a language and the *metier d'historien*: some considerations on practice" in Pagden (ed.) pp.30-31.

In chapter one I showed that the legal recognition of native title was a consequence of the repudiation of *terra nullius*. However, I indicated that while native title is theoretically now compatible with the common law, in practice extinguishment has been widespread. This indicates a connection between possible limitations of the Act and two conceptual issues. Firstly, the difficulty in perceiving Aboriginality as being wholly modern but also derived from the indigenous traditional past. Secondly, the concept of indigenous rights requires a notion of equality but also of distinct indigenous rights.

Discussing eighteenth and nineteenth century European reactions to the 'newness' of America, the historian Anthony Pagden points towards an issue with implications for Australia:

> America was new in both senses of the word: new in relation to geological and human time, and new in relationship to us, the European observers. This is the paradox of Rousseau's savage Caribs. *They are contemporary with the reader, yet they belong to a period of human infancy.* It was a paradox for all those who saw in this new land the image of a world which man, in his progress from the state of nature to civil society, had had to abandon.[4]

I suggest that in contemporary Australia indigenous people are required to demonstrate a constructed 'Aborigine' in order for society to be *comfortable* with the rights being bestowed. This then impacts on the location of those rights, as well as the culture that 'proves' the rights to be ongoing. Australian common law emerges from *Mabo* recognising a doctrine of native title. It is in delineating contexts of native title that the source and content of the complexity of land rights can be seen. For example, the concept of the persistence of native title might be seen as

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[4] Anthony Pagden *European Encounters with the New World - From Renaissance to Romanticism* Yale University Press, New Haven and London, 1993, p.117, my emphasis.

compatible with ideas of "the Aborigine" as inhabiting 'wilderness', where extinguishment would seem unlikely. However, the pastoral and mining industries negate this view - it becomes difficult to define when extinguishment has or has not occurred. Conversely, in more 'settled' areas, extinguishment might *seem* obvious, but indigenous relationships to land may also be ongoing.

Discussion of the doctrine of *terra nullius* as metaphor further conveys the complexity of the issue of indigenous rights to land. An act of producing a new representation does not necessarily expunge the effects of previous (mis)representations - *Mabo* does not create a 'fiction-less' legal landscape. While reaching a defined but also ambiguous position, I argue in particular it enshrines as acceptable and plausible questions of rights and identity which do not sit comfortably within current liberal-democratic institutions, conventions and philosophies. For example, sovereignty and the English-influenced notion of the common law might as easily be referred to as 'legal fictions' as the doctrine of *terra nullius*[5], the point perhaps more being the plausibility of respective fictions.

The point I make - and this is why context is so actively employed - is that there are many historical and epistemological sources which contribute to a definition of native title. In particular, native title is a term which aims to describe indigenous connections with the land in language compatible with the common law and property law. Native title is therefore part of a history of depicting and describing indigenous people that has existed since non-indigenous people desired to use the land for new, unfamiliar purposes. At the same time native title has a more

[5] Ellen Meiksins Wood *The Pristine Culture of Capitalism: an historical essay on old regimes and modern states* Verso, London & NY, 1991, pp.43-46. At p.45, Meiksins Wood states "The common law, perhaps more than any other single institution, appears to confirm England's incorrigible attachment to its feudal past."

limited official meaning, in which its purpose is to provide the legal mechanism by which some ongoing indigenous rights to land can be affirmed. Politically the term both embraces and is disconnected from its historical origins. Native title in Australia exists in a period of contact relations marked by a desire for a coming together, a 'reconciliation', but one that also involves attaining a palatable degree of separateness.

**seventeenth plus eighteenth equals twentieth**

In one sense, the term 'native title' is confined to its judicial and legislative definitions, but it also represents a theoretical view of the nature of property stemming from colonisation that requires a broader discussion. I pursue the implications of this in the context of how arguments were constructed in *Milirrpum* and *Mabo*. Initially, I discuss what influence the legal and philosophical works of, for example, Locke, Vattel, Grotius or Blackstone should have on questions of indigenous land rights in contemporary Australia. While none of these thinkers had colonial Australia in mind, each wrote in the context of European imperialism, and collectively they have influenced liberal-democratic conceptions of sovereignty, property and individual rights?[6] While their individual and collective influences are substantial, interpreting these scholars to advance a certain political argument is anachronistic, and amounts to looking for twentieth century solutions with theories developed for seventeenth and eighteenth century problems.

[6] Where relevant in this section, I cite works from these theorists that I have used. However, as my intention here is to discuss how these thinkers have subsequently been employed, I have used quotations and cited editions used by those secondary sources.

The acquisition of territory through colonisation developed protocols - not to determine whether territory might be colonised, but rather to adjudicate on disputes *between* colonisers. The work of Vattel and earlier Locke in offering rationales for this approach, and Blackstone's codification of the settled as against conquered/ceded classification (see chapter one), are most significant, and their continuing significance is reflected by their use in *Milirrpum* and *Mabo*. However, the recognition of native title needs to be placed in the context of political shifts since 1972, and in particular the more widespread community debate over land rights. This in turn requires attention to the history and epistemology of colonisation, of contact histories, and perceptions of indigenous and non-indigenous peoples about contact history and their respective ongoing cultural priorities. Native title via the demonstration of ongoing traditional attachment is burdened by of these complexities.

Following *Milirrpum*, Lester and Parker suggested that any further legal action would need to be preceded by political debate, as occurred with the creation of the Woodward Royal Commission following the Labor federal election victory in 1972. However, as Hookey suggests, Blackburn could have *chosen* to endorse native title precedents from colonial law outside Australia, a matter which Justice Lionel Murphy argued in *Coe v Commonwealth* was still to be determined by Australian law.[7] However, more is involved than a judicial shift - starting with the Woodward Royal Commission, the political debate over indigenous land rights has broadened such that discussion of distinct and ongoing indigenous rights is a mainstream political issue. This context is itself limited; as Briscoe argues, "since

[7] Lester & Parker, p.190; John Hookey "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" *Federal Law Review* Vol.5, 1972-73, p.102; *Coe v Commonwealth* (1979) 53 A.L.J.R. 403, at 411, 412, but see 408 for the contrary view.

1792 Aborigines have been involved in property ownership and land-use in a number of different forms associated with ideologies of the time".[8] In claiming that *Mabo* overturns two centuries of dispossession, "current moral and political perspectives" limit notions of possession and evolving conceptions of land and identity among indigenous peoples.[9]

Vattel's *Law of Nations*, first published in 1758 with its first English translation in 1760, was accorded great respect in Britain in the second half of the eighteenth century (perhaps in part because he praised England's foreign trade achievements).[10] Nussbaum suggests that

> In accord with the general notion of the French Enlightenment, Vattel professed great admiration for the English Constitution; and the general political conception underlying Vattel's discussion quite naturally met with the favourable predisposition of a public whose most influential political philosopher was John Locke.[11]

In *Two Treatises of Government* (1690), Locke conceived of private property rights as stemming from land being mixed with labour.[12] Locke was concerned to argue for government that went beyond the divine right of the monarch to rule and took account of the liberty of the individual. He suggested a principle of private property as conveyed by making the land 'productive'. Barbara Arneil suggests one direct influence on Locke's theory on property was colonisation in America as "the question of property and the right of England to appropriate land already

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[8] Gordon Briscoe "Land Reform: Mabo and 'Native Title', Reality or Illusion?" *Pacific Research* November 1993, p.3.
[9] *ibid.*
[10] Emerich de Vattel *The Law of Nations* Law Booksellers and Publishers, London, 1834, p.37; Alex C. Castles *An Australian Legal History* Law Book Co., Sydney, 1982, p.16.
[11] Arthur Nussbaum *A Concise History of the Law of Nations* New York, Macmillan, 1950, p.161.
[12] John Locke *Two Treatises of Government* Cambridge University Press, ed. Peter Laslett (1960, 1967) 1988, p.288, see pp.285-302.

claimed by native Americans or other European nations is central to the colonial debates of this era".[13]

Invoking a Lockean idea of property, Vattel identified a moral obligation to cultivate, such that those who did not left themselves open to external interference:

> There are others, who, to avoid labour, choose to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.[14]

However, it is also possible to reproduce extracts from Vattel which appear to endorse a theory of native title. The historian Henry Reynolds states that Vattel's writings recognised the "property rights of nomadic people" as well as demonstrating "an enthusiasm for colonisation", and that he reconciles this by advocating a limited right of settlement. Reynolds argues,

> Clearly the writer who has been seen as providing justification for the settlement of Australia for the last 200 years, who has been quoted to that effect in parliament, from the bench, the pulpit and the rostrum, provides nothing of the sort. Vattel could certainly be used to justify the establishment of a colony on the shores of Sydney Harbour. He could not,

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[13] Barbara Arneil "John Locke, Natural Law and Colonialism" *History of Political Thought* Vol.XII, No.4, Winter 1992, p.601 but see pp.600-603.
[14] Vattel *Law of Nations* p.35.

> without totally distorting his work, be said to justify the claim that in 1788 every inch of territory became the property of the British Crown.[15]

Vattel's apparent vacillation perhaps stemmed partly from the mixed imperatives of respecting indigenous culture and imperialism. However, retrospective analyses should recognise that when Vattel's reasoning is applied to Australia, an inability to perceive that the removal of lands on the basis that the previous occupants were not using the land effectively demonstrated a lack of understanding of indigenous culture. As Hookey notes, "A significant portion of their lands would have been expropriated and they would have been required to make a revolutionary change in their means of subsistence".[16] Equally, the notion that Vattel should produce a wholly consistent and logical notion of property is only sensible when his writings are used by those trying to find wholly consistent and logical solutions to problems that defy cogent resolution. If his *Law of Nations* had not existed to be misinterpreted, would acts of colonisation have recognised prior indigenous possession?

In *The Law of the Land* Henry Reynolds prefaces his argument that indigenous land rights were acknowledged in colonial Australia with a review of legal-historical literature on the emerging law of nations that is compatible with the contemporary doctrine of native title.[17] However, Reynolds rejects a one-dimensional imperialist abrogation of indigenous rights, and he is notably effective in demonstrating that in these matters disagreements among both colonial authorities and settlers occurred. Bain Attwood asserts that Reynolds neglects the writings of John Locke

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[15] Henry Reynolds *The Law of the Land* Penguin, Ringwood (1987) 1992, p.18; See also Chapters 3 and 4 of H. McRae, G. Nettheim, L. Beacroft *Aboriginal Legal Issues - Commentary and Materials* Law Book Co., Sydney, 1991.

[16] John Hookey "Settlement and Sovereignty" in Peter Hanks and Bryan Keon-Cohen (eds.) *Aborigines and the Law - Essays in Memory of Elizabeth Eggleston* Allen & Unwin, Sydney, 1984, p.6.

[17] Reynolds, pp.7-29.

"and other theorists", and disregards important evidence relating to the colonial government's rejection of the validity of John Batman's treaty.[18] Rather than a "neglect", I suggest that Reynolds is perhaps too enthusiastic in connecting his re-interpretation of the past with political connotations of his own era. In searching for confirmation of a particular contemporary political stance in the theories which contributed to the idea of the liberal, capitalist nation-state, it is possible to read late twentieth century Australian contexts of language and intent into ideas which *in their own time* were not self-contained and were often contradictory. As C.B. Macpherson states,

> The greatness of seventeenth-century liberalism was its assertion of the free rational individual as the criterion of the good society; its tragedy was that this very assertion was necessarily a denial of individualism to half the nation.[19]

Similarly, when Reynolds employs Grotius to undermine the notion of 'discovery', he has in mind the contemporary recognition of native title. Grotius states it is wrong

> to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.[20]

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[18] Bain Attwood "Aborigines and Academic Historians: Some Recent Encounters" *Australian Historical Studies* Vol.24, No.94., April 1990, pp.130-131.

[19] C.B. Macpherson *The Political Theory of Possessive Individualism - Hobbes to Locke* OUP, Oxford (1962) 1988, p.262, see also p.196. Macpherson's "half" referred to males without property, but feminist theory points out that women were excluded, and in this thesis the exclusion of Aborigines is important. See Teresa Brennan and Carol Pateman "'Mere Auxiliaries to the Commonwealth': Women and the Origins of Liberalism" *Political Studies* Vol.27, No.2, 1979, p.195.

[20] Hugo Grotius *The Rights of War and Peace* 2 vols., London, 1738, 2, p.550, quoted by Reynolds, p.9.

In order for discovery to be translated in sovereignty acquisition, "actual possession" was necessary.[21] Reynolds concludes that while pre-contact Australia did not possess a European notion of a sovereign,

> The claim that the British were the first occupiers was the fundamental moral and legal foundation for the settlement of the continent . . .. Almost everything that was learnt about the 'blacks' during the first two generations of settlement bolstered the view that they and not the Europeans were the original occupiers of the continent.[22]

As with Vattel, however, alternative interpretations are possible. Arneil cites *De Jure Belli ac Pacis* to suggest that Grotius, like Locke, equated unoccupied land with uncultivated:

> If within a territory of a people there is any deserted and unproductive soil . . . it is the right for foreigners even to take possession of such ground for the reason that uncultivated land ought not to be considered occupied.[23]

Roling is more trenchant than Arneil, suggesting that Grotius

> formulated a law . . . that made it possible for the European states to conquer and dominate the greater part of the non-European world, and to do so in good conscience, firm in the conviction that, as Grotius affirmed, God was the source of this right.[24]

For Grotius, a critical issue relating to discovery is that it leads to sovereignty only when accompanied by "actual possession", the terms of which in the seventeenth

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[21] Hugo Grotius *The Freedom of the Seas* Oxford University Press, New York, 1916, p.11, quoted by Reynolds, p.11.

[22] Reynolds, p.28; See also, Rosalyn Higgins "Grotius and the Development of International Law in the United Nations Period" in Hedley Bull, Benedict Kingsbury and Adam Roberts *Hugo Grotius and International Relations* Clarendon, Oxford, 1992, p.278.

[23] Arneil, p.592, citing Grotius *De Jure Belli ac Pacis* ed. James Brown Scott, Classics of International Law Series, Washington D.C., 1925, Book II, ch.II, s.2, para.1.

[24] B.V.A. Roling "Are Grotius' Ideas Obsolete in an Expanded World?" in Hedley, Kingsbury and Roberts, p.295, see also 297.

century were unclear and subject to change, just as they are in the late twentieth century.[25] While scholars might argue whether actual possession occurred legally or illegally (or in what combinations of both), conclusions are unratifiable and, more importantly, subject to contradiction. Nussbaum notes that since Latin American nations have often held Grotius in high esteem with respect to international law,

> It matters little whether Grotius' views on these issues still represented the actual law of nations. To have Grotius on one's side in matters of international law is still an advantage.[26]

In the post-Napoleonic period, Nussbaum continues, there was an increase in international law problems which made "a systematic, detailed reference book on international law indispensable". He argues that Vattel's work fitted this requirement, while Grotius' was "outdated".[27] Writing in 1795 Immanuel Kant described seventeenth century international law theorists as

> Job's comforters, all of them - are always quoted in good faith to justify an attack, although their codes, whether couched in philosophical or diplomatic terms, have not - nor can have - the slightest legal force, because states, as such, are under no common external authority . . .. The method by which states prosecute their rights can never be by process of law - as it is when there is an external tribunal - but only by war.[28]

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[25] Grotius, *Mare Liberum* pp.11-12, cited by Elizabeth Evatt "The Acquisition of Territory in Australia and New Zealand" in C.H. Alexandrowicz (ed.) Grotian Society Papers Martinus Nijhoff, the Hague 1968, p.22.
[26] Nussbaum, p.111.
[27] Nussbaum, p.160. See also J.G. Starke "The Influence of Grotius Upon The Development of International Law in the Eighteenth Century" in C.H. Alexandrowicz *Grotian Society Papers* Martinus Nijhoff, the Hague, 1972, passim but especially p.172 and summarised p.176; F.S. Ruddy "The Acceptance of Vattel" in Alexandrowicz *Grotian Society Papers* 1972, p.179; Benedict Kingsbury and Adam Roberts "Introduction: Grotian Thought and International Relations" in Hedley Bull, Benedict Kingsbury and Adam Roberts *Hugo Grotius and International Relations* Clarendon, Oxford, 1992, p.3, 32.
[28] Immanuel Kant *Perpetual peace: a philosophical essay* Allen and Unwin, London, 1903, pp.131-32.

Nevertheless, in the context of an Australian doctrine of native title, it is apparent that Grotius (or Vattel, or Blackstone, or Locke) could be employed and cited by various protagonists, whatever justification or precedent they seek. We can conclude that Grotius grappled with competing emphases in the historical context in which he developed his theories, not the least of which was Dutch colonialism.[29]

That theories of property and principles of international law developed in part with the Americas in mind makes the mix of philosophy and history a potent illustration, but it does not assist in a late twentieth century Australian consideration of rights based on indigenous relationships to land. Pagden warns against twentieth century historical scholarship interpreting sixteenth and seventeenth century observers of American Indian cultures as moving inexorably towards the light, the Enlightenment "at the eighteenth-century end of the tunnel".[30] It follows that eighteenth century political thought related to indigenous populations should not be mistaken for, or relied upon to justify, twentieth century discourse. Pagden argues

> it is surely a mistake to regard as a *failure* any enterprise which did not set out to achieve the aims ascribed to it. It is a mistake, not only because it leads to improper judgements on the success or failure of a writer's works, but because it prevents the historian from asking what in fact the writer *himself* was trying to achieve.[31]

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[29] Kingsbury and Roberts, p.47; Arneil, pp.587-89.

[30] Anthony Pagden *The Fall of Natural Man - The American Indian and the Origins of Comparative Ethnology* Cambridge University Press, Cambridge, 1982, pp.4-9. For example, Eric Hobswarm assigns a status to the "pre-modern" which has more to do with affirming progress from the Enlightenment than considering the intricacies of either so-called "modern" or "pre-modern" societies; "Introduction: Inventing Traditions" in Eric Hobsbawm and Terence Ranger (eds.) *The Invention of Tradition* Cambridge University Press, Cambridge, 1983, p.10.

[31] Pagden *Fall of Natural Man* pp.4-5, Pagden's emphases.

Similarly, Macpherson suggests Locke's political theory is misinterpreted when the assumptions of later periods are attached to it, particularly given the limits of membership to his "civil society" and the implications this has for property rights.[32] I argue it is also a mistake to regard as a *success* any theory that does not set out to achieve the aims ascribed to it. Such anachronisms may be inevitable when colonising activity is imbued with legal and philosophical justification, but this inevitability itself reflects assumptions relating to power over land.

It is misleading to suggest, as Ritter does, that Mabo is "a work of historical scholarship", but it is true that the legal arguments espoused by the majority in *Mabo* are consistent with the historicism from Henry Reynold's 1987 work *The Law of the Land.* [33] Brennan's leading judgment does not directly cite Reynolds, focusing more intensively on a discussion of international law texts. However, with respect to the repudiation of *terra nullius* and the identification on conflated meanings of *terra nullius*, I argue his conclusions and his tone are consistent with Reynolds.[34] Deane and Gaudron, as well as Toohey, seem more directly influenced, the former endorsing Reynolds' discussion of colonial awareness, including government awareness, of indigenous rights to land.[35]

In a post-*Mabo* revised edition of his book, Reynolds himself states

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[32] Macpherson, p.194. See also Meiksins Wood, p.45.

[33] David Ritter "The *Mabo* Case and the National Native Title Tribunal in Historiography: *A much shouted-about intersection of law and history.*" unpub. paper *ANZ Law & History Conference* July 1995, p.1, pp.9-14; Tim Rowse *After Mabo - Interpreting indigenous traditions* Melbourne University Press, Carlton, 1993, p.21.

[34] *Mabo* (Brennan) at 27, 18-20.

[35] *Mabo* (Deane & Gaudron) at 78-82 (at 81, fn.286, 290) on awareness including government awareness, of proprietary rights, and Letters Patent in South Australia; (Toohey) at 141. See also French J *In the matter of the Native Title Act 1993, and In the Matter of the Waanyi Peoples Native Title Determination Application* Application QN94/9 in the National Native Title Tribunal, Perth, 14 February 1995, at 41-48.

> The High Court decisively rejected the concept of *terra nullius* arguing that it was a totally inappropriate foundation for the Australian legal system. In doing so the Court answered many of the stringent criticisms of Australian jurisprudence advanced in *The Law in the Land,* and in the process confirmed the arguments around which the book was crafted . . .. Neither domestic nor international law could sustain the traditions of the past.[36]

Reynolds recounts how in the late 1970s he discussed with Eddie Mabo the question of land rights for the Meriam people - "I also had a rudimentary knowledge of the American concept of native title which I explained to him".[37] The point here is that Reynolds wrote the 1987 edition of *Law of the Land* with the *Mabo* case and native title in mind. His criticism of terra nullius as wrong in fact leads directly to a summary of native title as developed in United States law in the first half of the nineteenth century and its applicability for Australia.[38]

Ritter states that "The Reynolds historiography enabled the High Court in *Mabo* to divorce itself from the historical stain of the Aboriginal dispossession, without detracting from its own discursive legitimacy."[39] In other words, Reynolds pointed a way for the High Court to advance legal conclusions contrary to those reached by Blackburn in *Milirrpum.* As with Brennan, Blackburn recognised an intricate system of law, but it was one he found that the common law could not acknowledge. However, more relevant to the establishment of the doctrine of native title to Reynolds and to *Mabo* than rejecting the doctrine of *terra nullius* is the disentangling of the conflation between absolute or 'radical' title due to

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[36] Reynolds, pp.186-87.
[37] *ibid.* p.186.
[38] Henry Reynolds The Law of the Land Penguin, Ringwood, 1987, chapter two. All subsequent references are to the 1992 edition.
[39] Ritter, p.14.

sovereignty, and ownership over land.[40] Here native title emerges as recognisable by the common law, but this is a starting point which then needs to take account of a history of dispossession and contact and interaction that Reynolds himself has spent considerable effort in revealing. Reynolds quotes Brennan's point that

> To treat the dispossession of the Australian Aboriginals as the working out of the Crown's acquisition of ownership of all land on first settlement in contrary to history. Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.[41]

While *Mabo* moves past this, it creates a doctrine of native title impeded by the principle of extinguishment. This reflects inadequate awareness of the complexity of appropriation settlement as well as an awareness that legal theory does not of itself solve political problems. That is not to argue with Reynolds when he states

> there was widespread dissatisfaction with the concept of terra nullius in the 1830s and 1840s. It simply didn't accord with the realities of colonial life.[42]

Nevertheless, I argue that *Mabo* heightened the need for a conceptual responses to land rights within Australian democracy, whereas the repudiation of *terra nullius*, by reducing history to legal precedent, might actually maintain the comfort supposed by *Milirrpum*. Prior to *Milirrpum*, H.C. Coombs had reported to then Prime Minister Harold Holt that a federal administrative response to Aboriginal affairs would require the coordinated involvement of many bureaucratic bodies.[43]

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[40] *Mabo* (Brennan) at 18-20; Reynolds, p.12; H. Reynolds "Origins and implications of Mabo: an historical perspective" in W. Sanders (ed.) *Mabo and Native Title: Origins and Institutional Implications* ANU, Canberra, 1994, p.25; Rowse, pp.21-24.
[41] Mabo (Brennan) at 50, cited by Reynolds "Origins and implications" p.29.
[42] Reynolds *Law of the Land* p.169.
[43] H.C. Coombs *Kulinma - Listening to Aboriginal Australians* ANU Press, Canberra, 1978, pp.2-3.

In his dissenting judgment in *Mabo*, Dawson suggested that the "legal and moral" responsibility for conveying land rights to the Meriam people lay "with the legislature and not with the courts".[44]

International law in general, including the doctrine of *terra nullius* in Australia, were legal instruments by which power was used to colonise. Robert A. Williams, Jr. states that

> Power, in its most brutal mass-mobilized form as will to empire, was of course far more determinate in the establishment of Western hegemony in the New World than were any laws or theoretical formulations on the legal rights and status of American Indians. But the exercise of power as efficient colonizing force requires effective tools and instruments . . . law and legal discourse were the perfect instruments of power for Spain, England, and the United States in their colonizing histories, performing legitimating, energizing, and constraining roles in the West's assumption of power over the Indian's America.[45]

Added to this should be non-indigenous society's perception of the privileging of the law. In the context of the interaction of Asian and Western law, Masaji Chiba states that

> model jurisprudence, convinced of its universality, will not pay due attention to the cultural problems which accompany such diffusion or conflict between Western specificity and non-Western specificities.[46]

*Mabo* identifies this in past law, but not in its own judgments. As defined in the *Native Title Act 1993*, the Australian doctrine of native title amounts in part to legal translation of anthropological interpretations; neither the rights it bestows nor the

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[44] *Mabo* (Dawson) at 136.
[45] Robert A. Williams, Jr. *The American Indian in Western Legal Thought - The Discourses of Conquest* Oxford University Press New York, pp.7-8.
[46] Masaji Chiba *Asian Indigenous Law: In Interaction with Received Law* KPI, London & NY, 1986, p.2.

tribunal or historical presentations necessary to confirm such title actually reflect (as opposed to interpret) indigenous culture.

That is not to suggest that native title is useless, but rather to reinforce the complications that accompany post-1992 developments. To what era of indigenous people are these native title rights potentially available? According to Dean Brown, the Premier of South Australia:

> It is fundamental to our approach that we recognise that we ought not seek to rectify any past injustice to Aborigines, however long ago any such injustice may have occurred, by penalising today's general community interests.[47]

This view is Utilitarian is its premise that the law and legal institutions ought to serve the general welfare.[48] Similarly, in debate over a *makarrata*[49] in the early 1980s, the then Coalition federal government offered the proviso that indigenous cultural rights "must reflect the special place of Aboriginal and Torres Strait Island people within Australian society *as part of one Australian nation*".[50] A link exists between the economic imperative that accompanies the affirmation of the rights of the majority. Dworkin argues that legal positivism and economic utilitarianism are twin aspects of ruling theory:

> Liberals are suspicious of ontological luxury. They believe that it is a cardinal weakness in various forms of collectivism that these rely on ghostly entities like collective wills or national spirits, and they are

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[47] Ministerial statement by the Premier, Hon. Dean Brown *South Australia's Response to Mabo and native title* Document tabled by the Attorney-General (Hon. K.T. Griffin), Legislative Council, 21 April 1994, p.[1].

[48] Ronald Dworkin *Taking Rights Seriously*, Duckworth, London (1977) 1978, p.vii.

[49] A Yolgnu term which at the time replaced 'treaty'.

[50] Parliament of the Commonwealth of Australia *Two Hundred Years Later*... Report by the Senate Standing Committee on Constitutional & Legal Affairs on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal People, AGPS, Canberra, 1983, p.17, quoting from a letter from then federal Minister for Aboriginal Affairs, Fred Chaney, to the NAC, my emphasis.

> therefore hostile to any theory of natural rights that seems to rely on equally suspicious entities. [51]

Iredell Jenkins identifies "law" as a tool by which "men" claim all kinds of rights:

> The new dispensation would require that law as the science of social engineering become an instrument that would rigidly control human conduct in all of its aspects, while hitherto law has been premised on the faith that men [*sic*] can be governed but that they cannot and should not be moulded like raw material, driven like machines, or herded like beasts.[52]

This theoretical view errs, like Blackburn's *Milirrpum* judgment, in supposing that this type of legal interpretation is neutral or apolitical. Jenkins acknowledges a "thoroughly symbiotic" relationship between law and other social institutions.[53] If this is extended to include knowledge, perception and assumption then it becomes necessary to place the legal past in historical context just as places the legal present in partisan-political context. Certainly, as Laski argues, while the idea of the state is not itself a manifestation of unity, it is important that it be perceived as such.[54] The doctrine of native title appears to place those "natural rights" within the reach of the common law, but it remains unclear that this will be accommodated by the liberal-democratic nation-state.

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[51] Dworkin, p.xi.
[52] Iredell Jenkins *Social Order and the Limits of Law - A Theoretical Essay* Princeton Uni Press, Princeton, 1980, p.240.
[53] *ibid.* pp.371-372.
[54] Harold J. Laski *Studies in the Problem of Sovereignty* Yale University Press, 1917, pp.16-17.

*terra nullius* as metaphor

Following *Mabo*, if native title exists despite sovereignty bestowed by settlement, one legal conclusion is to see *terra nullius* as irrelevant.[55] This is legally persuasive, and can be viewed as a dispassionate description of a common law acceptance of native title. However, in a wider sense, I argue that *terra nullius* incorporates meanings, and encompasses contact histories, which transcend purely legal definitions. This occurs on occasion in *Mabo* - the majority reacted with moral indignation as well as with legal argument.

In historical and political contexts *terra nullius* acts as a metaphor for the right to dispossess in the name of progress, and also as a metaphor for those who consider such acts reprehensible ("terror nullius", as Mudrooroo says).[56] Hughes and Pitty juxtapose Henry Reynolds' view that the "colonial era came to an end of June 2, 1992" with the caution by Noel Pearson and Bob Weatherall that colonising influences remain ongoing in Australia despite *Mabo*.[57] Indeed, Paul Coe and Gary Foley have both suggested that *Mabo* confirms dispossession, albeit in distinctively regretful language. Foley states,

> To say that people who you have rounded up, kicked off their land, brutalised, massacred large numbers of them, whacked in concentration camps for a hundred years, done everything you can to destroy their

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[55] Sir Harry Gibbs, foreword to M.A. Stephenson and Suri Ratnapala (eds.) *Mabo: A Judicial Revolution - the Aboriginal Land Rights Decision and its Impact on Australian Law* University of Queensland Press, St Lucia, 1993, p.xiv; Bartlett *Mabo Decision - Commentary* p.ix [5.3].

[56] Mudrooroo Nyoongah "Beached Party" quoted in Meaghan Morris " "On the Beach" " in Lawrence Grossberg, Cary Nelson, Paula A. Triechler (eds.) *Cultural Studies* Routledge, NY and London, 1992, p.460.

[57] Ian Hughes and Roderic Pitty "Australian Colonialism After Mabo" *Current Affairs Bulletin* June/July 1994, p.14, citing Henry Reynolds in the *Australian* 16 August 1993, p.9, Bob Weatherall from *Sydney Morning Herald* 4 June 1992, p.4, Noel Pearson from "Aboriginal law and colonial law since Mabo" in Christine Fletcher (ed.) *Aboriginal self-determination in Australia* Aboriginal Studies Press, Canberra, 1994, p.155-56.

> language and culture and custom, steal their children from them, stick them in little white homes and then turn them into domestics and sex slaves and things like that and then you turn around 200 years later and you say, you people can't prove that you have had an ongoing link with your land, so therefore any rights that you had were extinguished 200 years ago. That is a load of garbage.[58]

Herbert Badgery, the 139 year old narrator of Peter Carey's novel, *Illywhacker*, is a trickster and a liar. When Bagdery is incarcerated, he busies himself by "learning to be an intellectual" through the study of Australian history, notably:

> M.V. Anderson's famous work which opens with that luminous paragraph which I will quote without abbreviation: "Our forefathers were all great liars. They lied about the lands they selected and the cattle they owned. They lied about their backgrounds and the parentage of their wives. However it is their first lie that is the most impressive for being so monumental, i.e., that the continent, at the time of first settlement, was said to be occupied but not cultivated and by that simple device they were able to give the legal owners short shrift and, when they objected, to use the musket or poison flour, and to do so with a clear conscience. It is in the context of this great foundation stone that we must begin our study of Australian history."[59]

Carey's weaving of the doctrine of *terra nullius* into the life of a professional liar provocatively challenges the legal fiction that the arrival of British property law was benign. It demonstrates that the instantaneous, technical task of *terra nullius* has evoked ideas and assumptions - both supportive and derisive - which have evolved but are present in contemporary language and debate.

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[58] Gary Foley, Radio station SCR (Melbourne), 26 January 1993, quoted by Hulme, p.51. See also Peter Cronau "Mabo - Confirming Dispossession" (interview with Paul Coe) *Broadside* 10 February 1993, p.4.
[59] Peter Carey *Illywhacker* University of Queensland Press, St Lucia, 1985, p.456.

It is the case that resort to the doctrine of *terra nullius* has on occasion been used to obstruct debate over indigenous rights to land in Australia.[60] As Herbert Badgery says, "It was M.V. Anderson who showed me that a liar might be a patriot."[61] If this indicates that indigenous identity has been shaped for appropriating circumstances, then narratives of contact histories are important sources to an understanding of meaning of land in Australia. According to Edward Said

> The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future - these issues were reflected, contested, and even for a time decided in narrative.[62]

Allowing for Said's exaggeration - "the issues" were surely only in part "decided in narrative" - it is true that this power extends beyond the writing to the reading, collating and dissemination of narrative. Said's brief discussion of Australia introduces major themes of *Culture and Imperialism* that have relevance for this thesis:

> I shall consider the ways in which a reconsidered or revised notion of how a post-imperial intellectual attitude might expand the overlapping community between metropolitan and formerly colonized societies. By looking at the differences contrapuntally, as making up a set of what I call intertwined and overlapping histories, I shall try to formulate an alternative both to a politics of blame and to the even more destructive politics of confrontation and hostility.[63]

The issue in Australia is not between two nation-states (ex-coloniser and ex-colony) and therefore the issue is far more subtle. Said employs a division where

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[60] Henry Reynolds "200 Years of Terra Nullius" *Aboriginal Law Bulletin* Vol.2, No.53, December 1991, p.11.
[61] Carey, p.456.
[62] Edward W. Said *Culture and Imperialism* Knopf, New York, 1993, pp.xii-xiii.
[63] ibid.p.19

coloniser and colonised have re-emerged as 'North' and 'South' (or 'developed' and 'developing'), which builds to his discussion of the imperialist United States.[64] This can be persuasive, but in Australia divisions exist within the liberal-democratic nation-state rather than between nations.

Said identifies Australia as "a 'white' colony like Ireland" and summarises the emerging colony in the context of Charles Dickens' 1861 novel *Great Expectations*.[65] He suggests that the empathy for "native Australian accounts" that is absent from *Great Expectations* exists in the (respectively convict and 'spatial') histories of Robert Hughes and Paul Carter, and that Dickens did not "'presume or forecast a tradition of Australian writing" that includes the fiction of David Malouf, Peter Carey and Patrick White.[66]

What the writers cited by Said demonstrate is that there are many different ways of describing the occupation and alteration of the land from the time of first colonisation. Although the Australian writers he cites are distinctive, they share as themes the problematisation of western geographic and legal meanings of land, and of connections between land and identity. They perhaps resonate for Said because they consider connections between land and identity, but they are also a limited representation of Australian writing that considers processes and effects of appropriation settlement.[67]

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[64] *ibid.* p.18, chapter four.
[65] *ibid.* p.xv.
[66] *ibid.* pp.xv-xvii. Said uses "native" to include non-indigenous as well as indigenous people of Australia.
[67] Malouf and Carter are perhaps most directly relevant to this thesis (the latter in particular in chapter three). Carey's *Illywhacker* is discussed above. Patrick White's writing is not as overtly spatial/political as Malouf's, but the subtle connections he makes between land and identity depict the development of Australian society, reflecting in particular that appropriation settlement was not benign for 'settlers' either; see in particular *The Tree of Man*, *Voss* and *A Fringe of Leaves*.

However, it is not clear whether the "overlapping" or superimposing of histories necessarily transcends a "politics of confrontation".[68] In David Malouf's *Remembering Babylon*, Jemmy is representative of the outward spread of settlers and settlements, and of the space between Aboriginal and non-Aboriginal as being a source of both conflict and accommodation. Having been shipwrecked, Jemmy lives with Aborigines in north Queensland for many years, and when as a young man he rediscovers non-indigenous society it is because that society is stretching towards him:

> The creature, almost upon them now and with Flash at its heels, came to a halt, gave a kind of squark, and leaping up onto the top rail of the fence, hung there, its arms outflung as if preparing for flight. Then the ragged mouth gapped. 'Do not shoot', it shouted. 'I am a B-b-british object!'[69]

Malouf's description resonates with crisp complexity, but a political/legal response would indicate that the Aboriginal people with whom Jemmy lived could also, had they considered it, proclaimed and bemoaned their legal status as British subjects. The broader point is that Jemmy's inability to re-adapt, as well as the community's confusion at his arrival and suspicion of his behaviour, reflect a profound ambiguity that emerges from an awareness that the land was viewed differently.

To Said, however, the relevance of these writers appears to rest as much in offering retrospective context to Dickens as in describing, comprehending or 'deconstructing' Australia. The implication is that these retrospective accounts offer new contexts which alter the meaning of *Great Expectations*. I suggest this misinterprets the power of narrative in the contexts in which it was written and

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[68] Said, p.19.
[69] David Malouf *Remembering Babylon* Random House, Sydney, 1993, p.3.

originally read. If Herbert Badgery was a studious prisoner post-June 1992, if he knew because *Mabo* told him that the doctrine of *terra nullius* was obsolete, he could find comfort in the implicit proposition that the deconstruction of narrative not only exposes perception based on self, but continues to work on his behalf by enacting change *for* him. In this context *Mabo* acts as a metaphor for the overturning of dispossession. However, the language of restitution in majority judgments, and subsequent supporters of those judgments, makes it possible to evoke the 'spirit' of *Mabo*, but the effective conclusions of the majority do not match their own spirit and are limited.[70]

That is, we appear to be able to conceive of *Great Expectations* differently when it is augmented by the contemporary writers chosen by Said. Similarly, contemporary legal, political, historical and literary work has contributed to the High Court's reasoning in their assertion that *Mabo* renders the doctrine of *terra nullius* obsolete (as opposed to incongruous). I suggest a distinction needs to be made between identifying the importance of narrative to Western conceptions of land, and supposing that such a recognition disempowers the initial narrative.[71]

Such a distinction needs to be made when interpreting the legal overturning of the doctrine of *terra nullius*. I do not suggest that *Mabo* is impotent; it acknowledges a theoretical possibility of ongoing native title based on indigenous relationships to land. It has spawned native title legislation, and a community debate that has probably been constructive more often than retrogressive. If *Mabo*'s effect is synthetic, it has also been synthesising, and with a basis in law that was

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[70] Henry Reynolds "The spirit of Mabo in danger of extinction" *Australian* 11 October 1993, p.11.

[71] "The double metaphor of the world as a text and a text as a world has a venerable history. To interpret means to react to the text of the world or to the world of a text by producing other texts." Umberto Eco *The Limits of Interpretation* Indiana Uni Press, Bloomington & Indianapolas, 1990, p.24.

conspicuously absent in previous treaty-makarrata-compact-treaty and national land rights legislation debates.

This effect results from a combination of law and metaphor, which is also the source of its limitations. Therefore, it is not surprising that the majority in *Mabo* were compelled to overturn the metaphorical as well as jurisprudential aspects of *terra nullius*. How does this impact on subsequent legislative and theoretical attempts to establish a meaningful doctrine of native title within the common law? Can the High Court's influence spread this far? What is the practical difference between claiming that indigenous people do not possess property, and altering that to say that they once possessed native title which has since been extinguished?[72]

What appears to have been discarded with the overturning of the metaphor of *terra nullius* is the accompanying perception of 'certainty' over property and land. When *Mabo* overturns *terra nullius*, there are political and conceptual as well as legal implications. The legal fiction of *terra nullius* is based in part on characterisations of 'the Aborigine'. Metaphor feeds off other metaphorical language, but in a post-*Mabo* environment it is not enough to challenge metaphorical constructions of the late eighteenth century. It is also necessary to consider subsequent constraints relating to the depiction of indigenous peoples.[73] If these metaphorical references become tied up in what is perceived to represent

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[72] Bartlett predicted the importance of extinguishment over the existence of native title: Richard H. Bartlett "Resource Development and the Extinguishment of Aboriginal Title in Canada and Australia" *University of Western Australia Law Review* Vol.20 No.3, pp.453-454.

[73] Stephen Muecke *Textual Spaces - Aboriginality and Cultural Studies* New South Wales University Press, Kensington, 1992, pp.33-34.

the 'traditional Aborigine', then we can begin to see the political power evident to Said.

However, while perceptions of *terra nullius* evolve, as evidenced by the change *Mabo* legally confirmed, such developments do not necessarily subsume earlier meaning. *Mabo* becomes a metaphor for the wider perception of indigenous rights - perceptions of non-indigenous Australia are broken down, but alternative perceptions are also constructed. Paramount among these is the belief that a new legal precedent of itself enacts rather than advocates change. Therefore, *terra nullius* is not less of an affirmating prop when it is summarily rejected as when it is casually upheld.

Concepts of native title, as with *terra nullius*, reflect not only a conflation of international and property law, but also an amalgam of historical, political, social, economic and moral circumstances, debate and disagreement. In particular, complications arise from the fact that the rejection in Australia of the doctrine of *terra nullius* is itself premised on a critique of dual notions of the meaning of power over land. The limits of translating indigenous relationships to land into land rights needs now not to look to sovereignty settlement, which in theory acknowledges native title, but rather to appropriation settlement.

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It is simplistic to suppose that complex theoretical issues underpinning the practical recognition of indigenous rights to land are conveniently solved by recognising that Crown sovereignty need not be challenged by a doctrine of native

title. When *terra nullius* is in turn evoked and condemned to endorse particular political or historical perspectives, 'solutions' based too extensively on legal convention are partial.

Debate over indigenous rights to land have in part spun on the axis of whether *terra nullius* reflected the absence of sovereignty or the absence of any tenure. However, this axis - notwithstanding the diverse views it encompasses - is itself limiting. A question emerges, to what extent is it true in *Mabo* that that doctrine of *terra nullius* is overturned? Put differently, does the confirmation of native title by the common law assign to the doctrine of *terra nullius* the right to claim sovereignty but not to revoke the proprietary rights of indigenous peoples from colonisation onwards?

If the law makes use of 'legal fictions' the question becomes the palatability of the authenticated 'fiction', that is, how the fiction relates to institutional requirements and wider society perceptions.[74] In this context, the doctrine of *terra nullius* is at once irrelevant and highly relevant, held in the past but in competing conceptions of the past, and receptive to the present. It is challenged by adherence to the doctrine of native title, but to what extent depends on how native title is defined, how it is considered to survive and how it will relate to other citizenship and property rights.

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[74] Hookey "Settlement and Sovereignty" p.16.

# Chapter Three
# Land and language

## When was settlement?[1]

> Before and after we Anchor'd we saw a number of People upon this Island . . .. From the appearance of these People we expected that they would have opposed our landing but as we approached the Shore they all made off and left us in peaceable posession of as much of the Island as served our purpose.
>
> - James Cook's Diary, 22 August 1770.[2]

In which direction was James Cook facing when he named this place "Posession Island" and (pro)claimed ownership on behalf of King George III over the eastern third of the continent? The immediate utility of Possession Island was that from its highest point he could establish that Cape York was not connected to Papua New Guinea.[3] Ceremonially, his flag-waving was directed beyond the equator towards other European powers rather than south towards the mainland. David Passi commented as well that "Cook had his back to the Torres Strait when he claimed possession."[4]

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[1] This title stems from the discussion of Gwyn A. Williams "When Was Wales?" in *The Welsh in their History* Croom Helm, London and Canberra, 1982, p.200, suggesting that "Wales is not a thaumaturgical act, it is a process, a process of continuous and dialectical historical development, in which human mind and human will interact with objective reality. Wales is an artefact which the Welsh produce; the Welsh make and remake Wales day by day and year and year. If they want to."

[2] James Cook *The Journals of Captain James Cook On His Voyages of Discover* J.C. Beaglehole (ed.) Cambridge University Press for the Hakluyt Society, 1968, p.387.

[3] *ibid.* p.387.

[4] Frank Brennan *One land, one nation: Mabo - towards 2001* University of Queensland Press, St Lucia, 1995, p.1.

To the Yumakundyi people, who occupied Tuidin and the adjacent tip of Cape York, Cook's proclamation and the subsequent processes of British colonisation apparently meant nothing for nearly a century.[5] However, Cook's explanation of the Yumakundyi dispersing, leaving the discoverers to do as they required with the land (in this case conduct a ceremony and leave) encapsulates an assumed dominating attitude towards rights accompanying 'discovery' - of the land 'settled' but awaiting settlers. When Arthur Phillip read his second commission on 7 February 1788, and certainly when land was subsequently appropriated, acquisition of British sovereignty by the legal mechanism of settlement was confirmed, and is not challenged by *Mabo*.[6]

In his history of "exploration, discovery and adventure" around Cape York, the geologist and explorer Robert Logan Jack suggests "It would have been more correct, dramatically"[7] if Cook's ceremony on Possession Island had been held on the mainland.[8] More significantly, he admonishes the "trivial circumstances" of history:

> On the summit of the highest hill in Possession Island, and therefore practically on the spot where Cook *planted* his flagstaff, a vein of Auriferous quartz was discovered by Mr.J.T. Embley in 1895 and worked by him and others for some years afterwards. It is safe to say that had the discovery been made by Captain Cook the development of Australia

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[5] Ursula H. McConnel "Social organization of the tribes of Cape York Peninsula" *Oceania* Volume X, 1939-40, pp.55-56. Also see Nonie Sharp *Footprints along the Cape York Sandbeaches* Aboriginal Studies Press, Canberra, 1992, pp.11-18, p.106, with the alternative spelling of 'yumukunti'.

[6] *Mabo* (Deane and Gaudron) at 58.

[7] Robert Logan Jack *Northmost Australia - Three Centuries of Exploration, Discovery and Adventures In and Around the Cape York Peninsula, Queensland* Vol.1, Simpkin, Marshall, Hamilton, Kent and Co., London, 1921, p.88.

[8] Although Paul Carter *The Road to Botany Bay - An Essay in Spatial History* Faber and Faber, London, 1987, p.27, suggests that "in the zigzag map created by his passage, Possession Island, far from appearing peripheral, stood as a symbolic centre, a jewel crowning his outline of names".

> would have proceeded from north to south instead of from south to north.[9]

This second stage of discovery - that of discovering the value of the land (Progression Island?) - is typified by Embley's gold mine.[10] By 1895 - around thirty years after the government township of Somerset was established to support the burgeoning cattle industry - the dispersal and dispossession of the Cape York Aborigines had been acute, with Yumakundyi survivors centred around Cowal Creek, or Injinoo.[11]

Whereas the doctrine of *terra nullius* looks outward from Possession Island through international law towards Europe, concepts of settlement look inward, inland, acting as the common law derivative of *terra nullius*. In a British/Australian legal sense, it is concepts and acts of settlement - not the doctrine of *terra nullius* - that impacted on indigenous laws and conventions of territorial ownership. Moreover, this concept of 'settlement' is different to the legal settlement that accompanies sovereignty acquisition. Deane and Gaudron described it in *Mabo* as:

> the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.[12]

However, if their implication is that *Mabo* absolves this "unutterable shame", I argue that their regret is ineffective unless its limitations are seen in wider political

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[9] Logan Jack, p.88, my emphasis. (Whatever direction Cook was facing he apparently did not look down.)
[10] *ibid.* Vol.2, p.660.
[11] Sharp, pp.25-77; McConnel, p.56; Noel Loos *Invasion and Resistance - Aboriginal-European relations on the North Queensland frontier 1861-1897* ANU Press, Canberra, 1982, especially pp.160-182.
[12] *Mabo* (Deane and Gaudron) at 79.

and historical contexts. Indeed, the limited sovereignty settlement confirmed within *Mabo* does not undermine ongoing traditional attachment. Indigenous relations to land exist despite it but nevertheless are threatened by appropriation settlement.

A concept of 'appropriation settlement' exists on two distinct but entwined levels. The first expresses a benign colonisation, "the settling of persons in a new country or place . . . a colony, esp. in its early stages". The second stems from "settle", as in, "to make stable; place on a permanent basis".[13] In combination, these two meanings can suggest the settlement of Australia as legally incontrovertible and conceptually unchallenging, but they also can be used as the basis for critical examination of assumptions relating to land. What Perry described as the Australian "expansion of Europe", that is, the incremental settlement of land, people, institutions and philosophies, requires us to consider legal and epistemological perceptions of 'the land' which may be challenged by indigenous land rights.[14] This expanded notion of settlement needs in turn to be distinguished from the desire to 'settle' the question of land rights, as in to conclude negotiations and reach a final solution which provides certainty.

**historicism and 'settlement'**

Conventional histories of 'settlement' in Australia do not comfortably accommodate the complexity of ongoing indigenous presence. Language, and

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[13] *The Macquarie Dictionary* Revised Edition, Macquarie Library Pty Ltd, NSW, 1981, p.1552. The dust jacket of the dictionary states "The possession of an agreed standard language is one of the marks of a fully independent national culture. Furthermore, a dictionary is still the traditional and indispensable means by which the details of a standard language are made available to its users."

[14] T.M. Perry *Australia's First Frontier - the Spread of Settlement in New South Wales 1788-1829* Melbourne University Press, Carlton, (1963) 1965, p.1.

priorities of history, tend to assimilate rather than recognise distinct indigenous histories:

> When the cues, the repetitions, the language, the distinctively Aboriginal evocations of our experience are removed from the recitals of our people, the truth is lost to us.[15]

As Muecke suggests, this indicates that the past is interpreted rather than reflected by the language used to record history.[16] Fesl identifies language as "the key element" of non-indigenous power:

> because Koories were perceived as "primitive", their languages, though considered by many people to be syntactically (grammatically) more complex than English, were guaranteed a place at the bottom of the linguistic hierarchy, being branded as "primitive", "heathen gibberish" and "rubbish language". The English language conferred a power on its speakers which was reinforced by religion, philosophy and what was presented as academic debate.[17]

This issue becomes more complex when Aboriginal oral tradition is translated not only into standard English, but into specialised judicial or political concepts.[18] However, it is not only indigenous testimonies and beliefs that are politicised. This chapter complicates appropriation settlement by doubting its incontrovertibility. Instead I argue that meaning of land is more complex. However, while this case can be made epistemologically, this places pressure on the Australian legal and political systems.

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[15] Marcia Langton "A Black View of History, Culture" *Age* 1 February 1981, cited in Stephen Muecke *Textual Spaces - Aboriginality and Cultural Studies* New South Wales University Press, Kensington, 1992, p.60.

[16] Muecke, p.60.

[17] Fesl, p.8, pp.27-28.

[18] The issue of oral testimony by indigenous peoples raises numbers of complex questions which are beyond the scope of this thesis. Nevertheless, the intersection of oral Aboriginal testimony and the language and motivations of the Australian common law is acutely complex, and is likely to manifest in native title and indigenous heritage determinations.

Paul Carter suggests,

> Possession of the country depended on demonstrating the efficacy of the English language there. It depended, to some extent, on civilizing the landscape, bringing it into orderly being. More fundamentally still, the landscape had to be taught to speak.[19]

If the land is burdened with such depth of interpretation, we can begin to see that an antithetic concept like native title is more easily proclaimed than implemented. This is because although 'sovereignty settlement' can be made irrelevant to the persistence of native title, 'appropriation settlement', as in populating with new people, institutions, ideas and language, imposes the possibility of extinguishment of native title.

How do and how can non-indigenous histories acknowledge relationships to land based on ongoing attachment? With the notion of extinguishment so critical, published and unpublished written accounts have political aspects attached to them not usually conceived of by the writer. Historical texts are deployed to confront challenges which their writers did not envisage them meeting. For example, the historian Geoffrey Blainey refers to economic development in Australia in the following way:

> In narrating why new countries grew and flourished it is customary to assign the cause to their poverty or richness in natural resources. But it is not simply the abundance of resources - whether fine soils or grasslands or minerals or forests - that creates development. The exact position of each resource, the points on the map which they occupy, is decisive.[20]

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[19] Carter, pp.58-59.
[20] Blainey *The Tyranny of Distance- How Distance Shaped Australia's History* Sun, Melbourne, (1966) 1970, pp.137-38.

Blainey does not accept that indigenous relationships to land leads to distinct rights.[21] More interestingly, from an historical perspective he is critical of interpretations of Australian history in *Mabo*.[22] Blainey appears to re-affirm an idea of Australian history that proclaims the virtuous effects of benign settlement and the challenge that native title presents. The theme explicit in his interpretation of Australian history is that development of the Australian nation-state has been largely positive, and therefore that the economic and technological development most responsible for this must also be positive. This has tended to lead to Blainey's histories being economic histories, emphasising linear notions of development and 'progress' over other aspects of contact histories.

Paul Carter suggests Blainey's view of history "is, in short, diorama history - history where the past has been settled even more effectively than the country".[23] This leads to there being contemporary land rights implications in Blainey's arguments. Reynolds argues that since earliest settlement there have been non-indigenous arguments in favour of indigenous proprietary rights, underpinned by their legal status as British subjects from 1788.[24] This led to the intention by some to offer compensation for land (although Fesl argues this concept of trading in land, "was completely alien to Koorie culture)."[25]

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[21] Geoffrey Blainey "Not because they are Aborigines, but because they are Australians" *Blainey Eye on Australia - Speeches and Essays of Geoffrey Blainey* Schwartz & Wilkinson, Melbourne, 1991, p.125.
[22] Geoffrey Blainey "Mabo decision looked back through modern blinkers" *Australian* 10 November 1993; Geoffrey Blainey *A Shorter History of Australia* Heinemann/Reid, Melbourne, 1994, p.236.
[23] Carter p.xx; See also Reynolds "Blainey and Aboriginal History" in Andrew Markus and M.C. Ricklefs (eds.) *Surrender Australia? Essays in the Study and Uses of History - Geoffrey Blainey and Asian Immigration* Allen & Unwin, Sydney, 1985, pp.83-84.
[24] Henry Reynolds *The Law of the Land* Penguin, Ringwood (1987) 1992, particularly chapters four to seven.
[25] Eve Mumewa D. Fesl *Conned! - Eve Mumewa D. Fesl speaks out on language and the conspiracy of silence. A Koorie perspective* University of Queensland Press, St Lucia, 1993, p.49.

Certainly, in *The Tyranny of Distance* Blainey's sweeping, picturesque narrative virtually ignores indigenous dispossession and resistance, suggesting a contact history between land and settler in which the Aborigine seems absent.[26] For example, he argues that "aboriginals or carnivorous animals who lived on the grasslands were not numerous enough to check the invasion of sheep", but from the early nineteenth century neither sheep, nor even the pastoral leases and people who accompanied them, eliminated indigenous reaction which varied from co-operation to forced compliance to violent resistance.[27]

Nevertheless, the repercussions (and the infrastructure) of economic settlement are not easily displaced. Reynolds comments on critics of the history of *Mabo* - "Bad history, they argue, produces bad law" - but the point I make is different.[28] The doctrine of native title contains contradictory aims - to conform to the existing system, and to assert distinctiveness from it. Similar contradictory requirements are placed on notions of indigenous 'tradition'. While *Mabo* informs us that native title exists within 'sovereignty settlement' the land that is potentially available for claim is that which is "*vacant* crown land".[29] This is burdened further by a necessary link to ongoing traditional attachment, which leaves ill-defined what 'tradition' is and indeed who will decide, an issue discussed in the next chapter. Re-interpretations of the development of Australia - uncovered research,

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[26] Reynolds "Blainey and Aboriginal History", p.83.

[27] Blainey *Tyranny of Distance* p.125, 132. See also Henry Reynolds *Frontier - Aborigines, Settlers and Land* Allen and Unwin, Sydney, 1987, pp.22-31; Henry Reynolds *With the White People - the Crucial Role of Aborigines in the exploration and development of Australia* Penguin, Ringwood, 1990, pp.5-40; Richard Broome *Aboriginal Australians - Black Responses to White Dominance 1788-1994* Allen & Unwin, St. Leonards (1982) 1994, pp.120-142.

[28] H. Reynolds "Origins and implications of *Mabo*: an historical perspective" in W. Sanders (ed.) *Mabo and native title: origins and institutional implications* ANU Research Monograph No.7, Centre for Aboriginal Economic Policy Research, Canberra, 1994, p.24.

[29] Australian Surveying and Land Information Group (AUSLIG) *Australia Land Tenure* Edition 1, 1993, Map 93/020, Commonwealth Government Printer, Canberra, 1993, my emphasis.

alternative perspectives, "hidden histories"[30] - inform and are informed by *Mabo*, but no particular historical perspective is validated by *Mabo* (not because the majority judgments do not claim the honour, but because the reach of history is too great).

Moreover, while history requires that arguments be made to support a theory, I argue Australian history cannot be interpreted in such a linear 'for' and 'against' manner. Reynolds displaces an unlikely certainty with a new unlikely certainty. In his discussion of South Australia, he cites examples of settlers and British and colonial government officials supporting land rights as evidence that this has always been reality in Australia. In particular, he focuses on the settlement of South Australia, suggesting that land rights were bestowed from the time of foundation.

The proposition that "South Australia was a theory before it became a place" is limited but compelling.[31] Given that it is stated in a recent *Atlas of South Australia*, it is as if E.G. Wakefield's theories of colonisation have been used to shade in the territories within the State's borders. A Lockean idea of property - and the proviso that all lands were open to purchase - came with the colonisers to South Australia.[32] As Richards notes, "The Wakefield system was designed to synchronise flows of labour and capital with the release of land for settlement".[33]

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[30] See for example, Deborah Bird Rose, *Hidden Histories: black stories from Victoria River Downs, Humbert River and Wave Hill Stations* Aboriginal Studies Press, Canberra, 1991.

[31] Trevor Griffin and Murray McCaskill *Atlas of South Australia* South Australian Government Printing Division/Wakefield Press, Adelaide, 1986, p.30.

[32] *An Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the Colonization and Government thereof* 4-5 William IV, cap.95, 15 August 1834, reprinted in Brian Dickey and Peter Howell (eds.) *South Australia's Foundation - Select Documents* Wakefield Press, Netley, 1986, p.44.

[33] Eric Richards "The Peopling of South Australia, 1836-1986" *The Flinders History of South Australia - Social History* Wakefield Press, Netley, 1986, p.117.

Concepts of property with the political theory of liberalism provided the rationale for settlement, both in promoting emigration to an initially sceptical British public and in funding the colony's growth. Moreover, settlers came to the colony expecting land and the potential for profit.[34]

Settlement consists of a series of actions and ideas, which in combination act as confirmation, but also may scrutinise and problematise. Certainly, as a colony planned about and legislated over from Britain, South Australia is a curious example, but one which can misleadingly be regarded as rooted in immutable theory. In this sense, South Australia highlights the argument I make that while the power of language must be declared, the power to challenge and alter language is nevertheless of limited political impact.

Two important preconditions of colonisation are identified in the preamble to the *South Australian Foundation Act 1834*:

> Whereas that Part of Australia . . . consists of waste and unoccupied Lands which are supposed to be fit for the Purposes of Colonization . . .. And whereas said Persons are desirous that in the said intended Colony an uniform System in the Mode of disposing of Waste Lands should be permanently established.[35]

First, any assumption that the land was "waste and unoccupied" was a matter of considerable debate not only in retrospect but also during the Bill's passage through the British parliament and during early colonisation. [36] It is clear that the

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[34] Robert Foster *An Imaginary Dominion - The Representation and Treatment of Aborigines in South Australia 1834-1911* unpub.PhD thesis, University of Adelaide, 1993, p.82.
[35] *South Australian Foundation Act 1834* p.43.
[36] P.A. Howell "The South Australia Act, 1834" in Dean Jaensch (ed.) *The Flinders History of South Australia - Political History* Wakefield Press, Netley, 1986, p.41-42, noting that the Letters Patent was not observed, but also that the preamble was not relevant. Graham Jenkin *Conquest of the Ngarrindjeri - the story of the Lower Murray Lakes tribes* Rigby, Adelaide, 1979, p.25 calls the preamble a "monstrous lie".

land was not "waste and unoccupied". It was also a matter of considerable debate during the Bill's passage through the British Parliament, and during initial colonisation.[37] Second, the "uniform system" that the Act delivered was itself a variation of a Wakefieldian theme, but it legislated inconsistencies and disagreement over who should run South Australia and how the colony should proceed.

Historiography is now recognised as neither objective nor inert, but it takes on a more acute level of pro-activity when historians seek explicitly to challenge or support contemporary political positions through their scholarship, including both the denial and the advocacy of indigenous land rights. In the early colonisation of South Australia, humanitarian intent was incompatible with the land requirements of Wakefieldian theory. Indeed, there were inconsistencies within the theory and application of systematic colonisation as well as conflicts between theory and implementation. Moreover, three bodies - the Colonial Office, the Board of Commissioners and the South Australia Company - all had power under the developed regime, and therefore all competed to impose their vision of South Australia onto the landscape.[38]

The Letters Patent of 1836 stated that

> nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal natives of the said province to the actual occupation or enjoyment in their own persons or in the persons of

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[37] Reynolds *Law of the Land* pp.97-124.

[38] Phillip Clarke *Contact, Conflict and Regeneration: Aboriginal Cultural Geography of the Lower Murray, South Australia* unpub. PhD thesis, University of Adelaide, 1994, p.227; J.M. Main "The Foundation of South Australia" in Jaensch, p.1.

> their descendants of any lands therein now actually occupied or enjoyed by such natives.[39]

Reynolds state that the Letters Patent was "a clear definition of native title as understood in other parts of the Empire".[40] Even if this is accepted, it remains equally clear, as Maddock states, that the Letters Patent was "honoured only in the breach."[41] Reynolds concludes that Aborigines had property rights and "They should continue to enjoy those rights of possession which could and should be inherited by their descendants like any other forms of property".[42] However, this disregards the complicated task of the various official dicta regarding South Australia, and avoids contemplation of the processes of colonisation. Moreover, it does not accurately reflect the regime that contemporary Australian native title produces.

The complicated regime of political power in early colonial South Australia created difficulties for the implementation of land policy, and therefore to policies and actions relating to Aboriginal land. Bowes states that

> In the first decade and a half of self-government the Department was hampered by the instability of governments, by the lack of experience of its officers and by being forced to deal with the land as if it was all equally usable when the Department knew full well of its great diversity.[43]

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[39] C.O. 13/3, cited in Reynolds *Law of the Land* p.110.
[40] Reynolds *Law of the Land* p.110.
[41] Kenneth Maddock *Your Land is Our Land - Aboriginal Land Rights* Penguin, Ringwood, 1983, p.112.
[42] Reynolds *Law of the Land* p.110.
[43] Keith Bowes *Land Settlement in South Australia 1857-1890* Libraries Board of South Australia, Adelaide, 1968, p.102. Bowes repeatedly raises the application of the Wakefieldian idea of equality of the land in this way. In a synopsis he notes his treatment of the issues is "deliberately parochial because the people involved were parochial".

On the one hand, unfettered availability of the land and the principle that all land was of equal value was centrally important to the settlement plans.[44] On the other hand, Wakefieldian theory did propose to return one fifth of every eighty acre section of land to Aborigines in a developed state.[45] This reflects both the pressure that did exist in Britain for relationships to land to be recognised, and that in colonial practice this pressure was not insurmountable.

Clarke states that there were over forty reserves by 1860, but more than half of these four thousand hectares were at Poonindie near Port Lincoln. In the Lower Murray, many reserves were sold in the mid-1860s. Clarke states that "Although the original plan was to leave parts of the landscape open to use by the Aboriginal inhabitants, this was not upheld".[46] Indeed, by 1860, one official view was that

> The melancholy fact has frequently forced itself upon the minds of the Committee, during their examinations, that the race is doomed to extinction, and it would only be a question of time when these reserves would again revert to the Crown.[47]

Reynolds effectively demonstrates that there was no one unchallenged and complete view that Aborigines were without rights, a point more necessary for his readers than for the people on his pages. He links the development of British anti-slavery organisations and individuals (notably the parliamentarian, Thomas Fowell Buxton) to the attention paid to questions of rights for Aborigines in South

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[44] Carter, p.202, citing Douglas Pike "The Utopian Dreams of Adelaide's Founders" *Proceedings of Royal Geographic Society of Australasia* Vol.53, 1951-2, p.72. See also Douglas Pike *Paradise of Dissent: South Australia 1829-1857* Longmans Green and Co., London, 1957, Chapter Four.
[45] Maddock, p.112.
[46] Clarke, p.227.
[47] *Report of the Select Committee of the Legislative Council upon the Aborigines* No.165 1860 pp.4-5, cited in Ronald and Catherine Berndt *From Black to White in South Australia* Cheshire, Melbourne, 1951, p.60.

Australia.[48] However, when he refers to nineteenth century advocation of land rights based on prior occupation the meaning then intended is equivocal. For example, Reynolds quotes from a proposed system of legislation by a London barrister, Standish Motte, suggesting that

> it be a fundamental principle in colonization, that no settlement shall be made on any land possessed or claimed by its aboriginal inhabitants, without their consent, formally obtained by treaty, or otherwise substantially acknowledged by them.[49]

It is not clear precisely what this meant for Australian colonies. For example, Motte also suggests

> That the aborigines shall be located upon the reserved lands upon the allotment system, with the emulative principle of a further grant of land for improvements; that in making the allotments of land to the natives, an adequate portion shall be appropriated to each family, but regard shall be had to the previous rank and possessions of the parties.[50]

The difficulties of Australian Aborigines participating in such a scheme while maintaining their previous modes of subsistence are apparent. In this context, individualism is not 'responsible' for dispossession, but perhaps illuminates why the granting of allotments of land would not preserve indigenous culture.[51] In the nineteenth century (even more so than the twentieth) land rights were not equivalent to indigenous relationships to land. While a difficulty exists between proposing and implementing rights, it is also necessary to perceive what those rights might be. Both these issues are still being debated in post-*Mabo* Australia.

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[48] Reynolds *Law of the Land* pp.81-86.
[49] Standish Motte *Outline of a System of Legislation, For Securing Protection to the Aboriginal Inhabitants of all Countries Colonized by Great Britain* London, 1840, p.15; Reynolds *Law of the Land* p.86.
[50] Motte p.16.
[51] J.G.A. Pocock "Tangata Whenua and Enlightenment Anthropology" New Zealand Journal of History, Vol.26, No.1, April 1992, p.43.

How are we to weigh the relative importance of the Letters Patent and the suggestion that South Australia was "desert and unoccupied"? It is evident that the theoretical force of these incompatible approaches were at different times both taken account of in the early colonisation of South Australia. Citing Motte (for example) does highlight a debate which as Reynolds emphasises has subsequently been undervalued. Nevertheless, it is implausible that this might 'prove' ongoing native title, any more than the draft legislation circulated by the Australian Mining Industry Council in 1993 'proves' that native title is replaced by 'customary rights' or that the *Racial Discrimination Act 1975* is amendable to suit specific purposes.[52]

Reynolds correctly states that the Letters Patent contained "a clear definition of native title as understood in other parts of the Empire"[53], but this only reinforces the distinction between the intent of (some of the) official dicta, and the course that appropriation settlement took in the early colonisation of South Australia. Moreover, it is clear that the notion of the rights to be bestowed were limited to perceptions of Aboriginal abilities. Indeed, references to the need for adequate compensation and for recognition of Aboriginal rights as British subjects were sources of constant consternation, dissertation and disagreement in the various colonies. Processes of new occupation and dispossession were complex, even if colonising action is left aside momentarily and political thinking alone is considered. Reynolds states, "In virtually ignoring the Aborigines, Douglas Pike wrote a far more accurate tribute to the spirit of the South Australian pioneers than

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[52] AMIC *Customary Rights Act 1993* draft 30/7/93, S.6., 11.(1)-(2). See also Lauchlan McIntosh *Mabo: a practical not an historic solution needed* Address by the Executive Director of the Australian Mining Industry Council, Mr Lauchlan McIntosh, to the Police Club, Adelaide, 25 October 1993, p.3

[53] Reynolds *Law of the Land* p.110.

he may have realised".[54] This is precisely the point, although not in the way that Reynolds intends. Altruistic sentiment is relevant in the colonisation of South Australia, but isolated attention to its exponents is skewed, particularly when subsequent history shows they frequently did not achieve their desired outcomes.[55]

The links Reynolds makes between "The first land rights movement" and the emergence of native title as enunciated in *Mabo* are tenuous.[56] Such retrospective connections either belie complexities or are build on sparse evidence, acquiring an authentication in that the native title process which has emerged post-*Mabo* is rendered 'natural', a logical end to an historical process vindicating all previous pro-land rights concepts. Neither it is clear that the type of 'land rights' proposed would have dramatically improved (although they would certainly have altered) the contemporary and subsequent legal status of indigenous peoples and their land rights.[57]

There seems to be an idea of a qualitative break between Geoffrey Blainey and Henry Reynolds (as if it were as 'simple' a shift as the judicial shift from *Milirrpum* to *Mabo*).[58] This requires that all of Blainey be rejected in order that we might *progress* to Reynolds, as if the chronology of historical texts is the same as a logic of

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[54] *ibid.* p.122.
[55] French J *In the matter of the Native Title Act 1993, and In the Matter of the Waanyi Peoples Native Title Determination Application* National Native Title Tribunal, 14 February 1995, at 65: "The interest granted was properly described as a lease. It conferred a right of exclusive possession unqualified by any reservation in favour of Aboriginal people. Whatever the sentiments of Earl Grey and his contemporaries in relation to the rights of Aboriginal people in this respect, they were not translated into mandatory reservations required in every case of the grant of a pastoral lease."
[56] Reynolds *Law of the Land* chapter four.
[57] *ibid.* p.96.
[58] An example of this is Ritter pp.6-14. I argue that such an approach is implicit in the work of both Henry Reynolds and Geoffrey Blainey.

events where time plus cause and effect dictate that one event did inevitably follow (or indeed precede) another.[59] This way of interpreting and categorising historical progress imitates Blainey's stringent idea of progress as material improvement. In this context, the role of Australian history in revealing the 'Aboriginal past' is limited by the western concepts of time and knowledge.[60]

I argue that it is implausible to chose to support, for example, the historical perspective of Blainey or Reynolds. Both contain important insights, yet both are limited - neither is simply employable to demonstrate *why and how* a concept of continuous indigenous rights to land should or should not be employed. Geoffrey Blainey's history emerges from historical and spatial interrogation maintaining a justifiable (if fragmentary) credibility in its narrative depictions of the consequences of economic settlement. When determining the possible persistence of native title, the decisions made by historians about which events relating to land use are significant or superfluous attract a new relevance. Blainey and Reynolds' work co-exist with an array of other indigenous and non-indigenous interpretations of land in an historical space that should remain contested. This means that we should not necessarily accept Blainey's argument that economic and technological development is automatically incompatible with the implications of *Mabo*, but that in doing so we should not dismiss the potency of his *description*. Indeed, Blainey's suggestion as to why distance proved a way of historicising Australia is useful:

> It may be that distance and transport are revealing mirrors through which to see the rise of a satellite land in the new world, because they keep that

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[59] Attwood *The Making of the Aborigines* Allen & Unwin, Sydney, 1989, p.147, informs this argument, in making a different point.

[60] Lenore Coltheart "The moment of Aboriginal history" in Jeremy R. Beckett (ed.) *Past and Present - the Construction of Aboriginality* Aboriginal Studies Press, Canberra, 1988, p.180.

> land's vital relationship with the old world in the forefront. In contrast many studies of a new land which ignore that relationship isolate the land from the outside world which suckled and shaped it.[61]

Similarly, Justice Dawson, in dissent in *Mabo*, may be reflecting his perception of the limitations of the law rather than being obscurant. He is aware also of the limits of history:

> the policy of the Imperial Government during this period is clear: whilst the Aboriginal inhabitants were not to be ill-treated, settlement was not to be impeded by any claim which those inhabitants might seek to exert over the land. Settlement expanded rapidly and the selection and occupation of the land by the settlers were regulated by the Governors in a way that was intended to be comprehensive and complete and was simply inconsistent with the existence of any native interests in the land.[62]

Although Dawson is in disagreement with the rest of the High Court on *Mabo* on the persistence of native title (although he accepts their precedent in *Western Australia v Commonwealth*)[63], his judgment also relies too heavily on an unequivocal conclusion about history as well as law. The effects of appropriation settlement - and the ways by which contemporary Australia should respond - go beyond a legal or historicist approach.

**shifting boundaries - questioning the shrinking frontier**

A common understanding of the idea of frontier assumes a (presumably shifting) border separating the settled from the apparently uninhabited.[64] This indicates the

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[61] Blainey *Tyranny of Distance* p.x.
[62] *Mabo* (Dawson) at 109.
[63] *State of Western Australia v Commonwealth* 128 ALR 1 (Dawson) at 70.
[64] *Macquarie Dictionary* p.709. See also T.M. Perry *Australia's First Frontier: the spread of settlemeent in New South Wales, 1788-1829* Melbourne University Press, Melbourne, p.1: "the advancing edge of settlement".

continued influence of Frederick Jackson Turner's 1893 interpretation that "The existence of an area of *free land*, its continuous recession, and the advance of American settlement westward, *explain* American development".[65] Turner argues that

> at the frontier the environment is at first too strong for the man. He must accept the conditions which it furnishes, or perish . . .. Little by little he transforms the wilderness, but the outcome is not the old Europe . . .. Moving westward, the frontier became more and more American. As successive terminal moraines result from successive glaciations, so each frontier leaves its traces behind it, and when it becomes a settled area the region still partakes of the frontier characteristics.[66]

Paul Carter notes the extending properties of the frontier, and highlights assumptions about what lies on either side of its boundary:

> Essentially, the frontier is usually conceived of as a line, a line continually pushed forward (or back) by heroic frontiersmen, the pioneers. Inside the line is culture; beyond it, nature.[67]

An idea of 'frontier' therefore contains assumptions about 'traditional' and 'civilised' modes of land use. It is included in the concept of appropriation settlement spreading - a concept which the previous section argues is at once limiting and misleading, but also compelling and enclosing of Australian society. What attention to the frontier emphasises is the economic imperative on which the colony developed, but also that this occurred in surprising ways and under difficult circumstances. Fred Alexander argues that

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[65] Frederick Jackson Turner "The Significance of the Frontier in American History" *The Frontier in American History* Holt, Rinehart and Winston, New York (1920) 1947, p.1, my emphasis.
[66] *ibid.* p.4; Perry, pp.2-3.
[67] Carter p.158.

> the sheepmen on the frontier rapidly revolutionised the penal settlement, challenged the small settler plans of Governors Bligh and Macquarie and gave the flourishing mid-nineteenth century New South Wales its dominating individualism political as well as economic.[68]

However, even if frontier *explains* rather than *describes* appropriation settlement, in terms of native title it sustains an idea of enforced change and therefore loss of tradition which is only a 'natural' conclusion if the assumptions contained within it are first perceived as 'natural'. It allows for the simplistic suggestion that "The invasion quickly showed that wherever the white foot trod the native withered away".[69] The moving frontier, retrospectively bolstered by the law, smothers indigenous relationships to land as it extends outwards from initial points of colonisation.

How does this meaning change if the frontier remains but the histories associated with it are described in more complicating ways? Henry Reynolds uses the concept and the location of the frontier to question historical accounts of Australia's emergence which suggest settlement was benign, peaceful, without incident, and incontrovertible. Frontier sites are described to demonstrate violence and resistance, characterising a settlement of Australia that was incremental, difficult and non-linear.

However, Reynolds shows that frontiers were frequently antagonistic and complicated places. If exploration followed discovery, then the "frontiers of

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[68] Fred Alexander *Moving Frontiers - An American theme and its application to Australian history* (Cambridge University Press for Melbourne University Press, 1947) Kenikat Press, New York, 1969, p.27.
[69] A. Grenfell Price *White Settlers and Native Peoples - An Historical Study of Racial Contacts Between English-speaking Whites and Aboriginal Peoples in the United States, Canada, Australia and New Zealand* Georgian House, Melbourne, 1949, p.100.

settlement"[70] followed behind the earliest contact; but to even propose the presence of an antagonistic frontier is to challenge the concept of benign settlement. This in itself challenges the notion of the 'traditional' Aborigine, unchanging until physically dislocated, and immediately allows for alternative occurrences to co-exist. For example, Baker suggests an idea of frontier ought to include two way movement - he asks to what degree contact resulted from outward European movement or from inward indigenous movement.[71] Moreover, the European settlements that Aborigines moved into were often originally Aboriginal camps[72], for instance at the Point McLeay mission (now Raukkan) established in 1859 in South Australia. When Aborigines 'came in', from European perspectives they submitted to official policy towards them, that is to descriptions as well as locations imposed on them, although Aboriginal ideas about what 'coming in' meant were probably far different. Similarly, the death or dislocation of many people from one group could lead to appropriation of land by a neighbouring group.

This shifting indigenous ownership now complicates native title determinations, a problem first encountered with the Finniss River land claim under the *Northern Territory Land Rights Act 1976*. Even as indigenous land rights are recognised, potential ways of implementing this tend to require the rights to be held by one particular indigenous group. In his report on Finniss River, Justice Toohey suggested that with respect to indigenous relationships to land "It may be that the answer demanded by the Act is not that demanded by anthropology, if indeed

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[70] Reynolds *Other Side of the Frontier - An Interpretation of the Aboriginal response to the invasion and settlement of Australia* History Department, James Cook University, Townsville, 1981, p.4.
[71] Richard Baker "Coming In? The Yanyuwa as a case study in the Geography of Contact History" *Aboriginal History* Vol.14, No.1-2, 1990, p.29.
[72] *ibid.* p.41.

anthropology is able to insist on one answer". [73] In *Mabo*, Toohey states also that the *Aboriginal Land Rights (Northern Territory) Act 1976*

> recognises that traditional occupation may not be exclusive. It may be, for instance, that one group is entitled to come on to land for ceremonial purposes, all other rights in the land belonging to another group.[74]

In *The Other Side of the Frontier*, Henry Reynolds attempts to (re)create an indigenous history of frontier. [75] Paul Carter doubts the usefulness of a concept that generically describes what are distinctive "boundary experiences which define the act of settlement".[76] While acknowledging Reynolds' intention to offer a history recording dispossession, Carter's concern is that even in utilising the term 'frontier' - and particularly when purporting to do so from an indigenous perspective - Reynolds is imposing rather than reflecting an idea of 'Aboriginal history'.

This recalls Langton's earlier suggestion of indigenous histories becoming lost beneath appropriating language. When a conventional historical text utilises a concept of settlement which complicates and therefore challenges, it nevertheless incorporates non-indigenous assumptions about land *into the challenge*, making it a

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[73] Aboriginal Land Commissioner *Finniss River Land Claim* Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Miinister for Aboriginal Affairs and to the Administer of the Northern Territory, AGPS, Canberra, 1981, pp.20-21. See also Kennеth Maddock "Involved Anthropologists" in Edwin N. Wilmsen (ed.) *We Are Here - Politics of Aboriginal Land Tenure*, University of California Press, Berkeley & LA, 1989, p.172.Ian Keen "A question of interpretation: the definition of "traditional Aboriginal owners" in the Aboriginal Land Rights (N.T.) Act" in L.R. Hiatt (ed.) *Aboriginal Landowners - Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* Oceania Monograph No.7, University of Sydney, 1984, p.34; French *Waanyi Determination* at 13-14.

[74] *Mabo* (Toohey) at 148.

[75] Reynolds *Other Side of the Frontier* particularly chapters six and seven. See also Fergus Robinson and Barry York *The Black Resistance - An introduction to the history of the Aborigines' struggle against British colonialism* Widescope, Camberwell, 1977.

[76] Carter, *Road to Botany Bay*, p.160.

non-indigenous interpretation of what an indigenous perspective *might* reflect. The subjectivity is still constituted by European, not Aboriginal, ideas and experiences. Carter seems to suggest that what Reynolds has achieved in *The Other Side of the Frontier* is a Europeanised history of how indigenous peoples in Australia would have reacted to encroaching Europeans had they been Europeans (or indeed European historians). Therefore, Reynolds may submit indigenous knowledge to a paradigm that allows discussion by the 'primitive', but he does not appear to allow for the possibility of the 'primitive' casting aside the paradigm.

Determining boundaries requires a conception of the content of indigenous relationships to land. Norman Tindale, who 'mapped' Aboriginal 'tribes', suggested that

> it seems clear that at the general level of the Australian hunter, tribal cohesion depends on community of thought and communication by reason of the possession of a common language . . ..
> When plotted on large-scale maps, it is . . . there is often a high degree of correlation between tribal limits and ecological and geographical boundaries.[77]

The imposition of European boundaries suggests the need not only to question the information and interpretation of authors, but also inquire into the basis on which those opinions/interpretations are formed. For example, Davis and Prescott, who draw on Tindale's boundary collations, state

> It seems to us that where the knowledge is intact land claims should be decided on the basis of that knowledge where the proofs are provided. Where the knowledge about the precise extent of traditional territories has

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[77] Norman B. Tindale *Aboriginal Tribes of Australia - Their Terrain, Environmental Controls, Distribution, Limits, and Proper Names* (with an appendix on Tasmanian Tribes by Rhys Jones) Australian National University Press, Canberra, 1974, pp.55-56.

> been lost mechanisms must be devised to make land grants or compensation without the charade of re-inventing knowledge or elaborating traditions that are imperfectly known or found in the records of anthropologists who did their work decades ago.[78]

Cowlishaw argues that Davis and Prescott do not take account of the difficulty in applying terms such as 'frontier' and 'boundary' to indigenous relations to land, and that they misinterpret that point as being a claim that Aboriginal peoples could not accurately describe the specifics of their land ownerships.[79]

Apart from 'pure' anthropological issues, in the context of native title claims it is 'traditional' - as in 'primitive' - Aborigines who are deemed authentic.[80] Davis and Prescott's reference to "Australia" in their title refers to areas of Arnhem Land and central Australia, as well as to islands in the Torres Strait. The ability to establish immutable, unchangeable boundaries reflects the need for certainty from a particularly non-indigenous perspective. More broadly, it is not that indigenous conceptions of land ownership were vague, so much as to describe them in written standard English, let alone in property law terms, requires a use of language allowing more flexibility and ambiguity. Similarly, this is the case for depictions of Aboriginal boundaries on Western-style maps. Davis and Prescott express indignation that a publisher, believing that Aborigines roamed across the country, used "dotted lines!" on an early map of boundaries produced by Tindale in the

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[78] S.L. Davis and J.R.V. Prescott *Aboriginal Frontiers and Boundaries in Australia* Melbourne University Press, Carlton, 1992, p.xii.

[79] Gillian Cowlishaw "Review of S.L. Davis and J.R.V. Prescott *Aboriginal Frontiers and Boundaries in Australia*" *Oceania* Vol.64, No.1, September 1993, p.85.

[80] To see concerns over the breadth of native title in this context, see Kevin Prince (Minister for Aboriginal Affairs Western Australia) "What the future holds" in Richard H. Bartlett and Gary D. Meyers (eds.) *Native Title Legislation in Australia* Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, Perth, 1994, p.297; John Hookey "Native Title Act 1993 (Cth): Fine Tuning Needed" *Australian Property Law Journal* 1994, p.248.

1920s.[81] However, some anthropologists use dotted lines in an attempt to convey as well as the existence of defined territories, that the land might have different and complex meanings for different peoples, and to distance such information from connotations of property boundaries. As was suggested in the land claim under the Northern Territory Act by the Alyawarra and Kaititja people, "Countries are best defined as clusters of points in space, rather than as enclosed, bounded spaces".[82] At the same time, indigenous individuals and groups face a tension between attempting to assert their fullest political rights, while also adopting expedient positions that allow for debate and gradual progress.[83] Non-indigenous participants in the land rights debate need also to be aware of these dual responsibilities held by indigenous people.

As Meaghan Morris suggests, the idea of a frontier involves "conflicting, as well as changing, concepts of space, time and motion".[84] That is not to suggest that Reynolds' history must be disingenuous - he is explicit that his is a "white man's interpretation".[85] Perhaps it is more the concept of the boundary itself - whatever occurred "there" - that is limiting. What can be the status of a particular tract of land, legally and/or conceptually, once the frontier is deemed to have passed over it? Put differently, once a "frontier settlement"[86] is no longer a frontier but wholly

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[81] Davis and Prescott, p.18.
[82] Evidence of Dr O'Connell, cited in Aboriginal Land Commissioner *Land claim by Alyawarra and Kaititja* Report to the Minister for Aboriginal Affairs by the Aboriginal Land Commissioner, Mr Justice Toohey, AGPS, Canberra, 1979, p.12. See also Marc Gumbert *Neither Justice nor Reason - A Legal and Anthropological Analysis of Aboriginal Land Rights* University of Queensland Press, St Lucia, 1984, pp.129-32.
[83] Tim Rowse "The principles of Aboriginal pragmatism" in Goot & Rowse (eds.) p.86.
[84] Meaghan Morris "Panorama: The Live, the Dead and the Living" in Paul Foss (ed.) *Island in the Stream - Myths of Place in Australian Culture* Pluto, Leichhardt, 1988, p.170.
[85] Reynolds *Other Side of the Frontier* p.1.
[86] Henry Reynolds "White Man Came Took Everything" in Burgmann and Lee (eds.) p.5. Also Jan Critchett *A 'distant field of murder' - Western District Frontiers 1834-1848* Melbourne University Press, Carlton, 1990, p.6.

a settlement, does it only possess non-indigenous concepts of land use? Or is it still territory in dispute?

These questions cannot be simply answered, and any historical conclusions perhaps inevitably carry with them a political opinion. Henry Reynolds states that

> European and Aborigine met in such a wide variety of circumstances that the historian may never be able to reduce the diversity to simple patterns of behaviour. For the foreseeable future description may have to take precedence over analysis.[87]

However, Reynolds has usually claimed passion and politics rather than "detached scholarship" as his motivation.[88] What do 'we' *do* with his description? Reynolds is not able to predict or influence what implications his (politically charged) descriptions will have on the contemporary debate over indigenous land rights, nor how he might be interpreted and for what purposes.

To understand the relevance of this to a discussion of indigenous rights it is necessary to re-consider the conflation that can occur between 'sovereignty' and 'appropriation' settlement. Challenging historical perspectives such as those proposed by Reynolds leads towards the notion that indigenous society /societies have evolved in complex ways which relate both to pre-contact and post-contact influences and effects. Theoretical notions about the land and the nation-state co-exist in complicated ways which require consideration of more questions, notably to do with the parameters of 'valid' indigenous 'tradition'. In turn, these are likely to *unsettle* issues relating to distinctly indigenous rights in Australia which may

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[87] Reynolds *Other Side of the Frontier* p.17.
[88] For example, Reynolds *Other Side of the Frontier* p.1. See also Ann Curthoys "Rewriting Australian History: Including Aboriginal Resistance" *Arena* No.62, 1983, pp.101-102.

otherwise remain extant but unstated. It does not follow that the benign frontier should not be subject to re-interpretation - rather, the point I am making is that native title is no more likely to persist, indeed it may be less likely, and certainly rights based on indigenous relationships with land become more difficult to define.

Indeed, the three central themes which Reynolds identifies in *Frontier* - "frontier conflict, racial ideology and land ownership" - encapsulate why this approach is both compelling and limited.[89] Politics post-*Mabo* requires these historical projections to be tested and retested both in the context of alternative histories and contemporary institutional Australia. Indeed, one of the strengths of Reynolds' historicism is to demonstrate that there has always been disagreement over fundamental questions relating to indigenous rights to land (which however can move too easily into suggestions that *Mabo* was inevitable based on its inherent 'rightness').[90]

Loos' description of an active frontier states

> All Australians must realise that the history of the frontier, a very recent history in many parts of Australia, is alive in the present relationship existing between Aborigines and non-Aborigines.[91]

This implies that contemporary contact between indigenous and non-indigenous has changed little, although this is perhaps made more acute given that Loos' focus is Cape York, still often perceived as a 'wilderness' beyond a frontier.[92] Similarly,

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[89] Reynolds *Frontier*, p.viii.
[90] For example: "Some C19th observers pushed hard against the intellectual constraints of their time and a few broke through to a genuine appreciation of Aboriginal culture and an understanding of the massive 'white problems' they had to contend with." Reynolds *Other Side of the Frontier* p.3.
[91] Loos, p.ix.
[92] Sharp, pp.137-39.

while Howard Morphy conveys ongoing duality, the Roper Bar frontier in the Northern Territory he describes has remained a boundary between settled Australia and the 'wilderness' Arnhem Land:

> Aborigines have been as much a part of the history of the region over the last 150 years as have white Australians and hence they also have views of the landscape that link it to the processes of white colonisation, to the spread of the cattle stations, and so on.[93]

However graphic and detailed a history of dispossession and/or co-habitation may be, an idea of settlement stemming from frontier does not allow for indigenous culture continuing, in whatever altered and perhaps displaced form. In a political environment where rights stem from avoiding dispossession and extinguishment of traditional culture, this is essential. Is it possible to pursue from non-indigenous thought an epistemological conception of land which accurately conveys indigenous conceptions of land?

Such attempted displacement of stability is not usually deemed helpful, even when it *describes* instability not previously described, as opposed to *creating* it. The insistence on universalising theory, on systematised knowledge, can reduce rather than enhance understanding, particularly if

> Coherent theories in an obviously incoherent world are either silly and uninteresting or oppressive and problematic, depending on the degree of hegemony they manage to achieve. Coherent theories in an apparently coherent world are even more dangerous, for the world is always more complex than such unfortunately hegemonous theories can grasp.[94]

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[93] Howard Murphy "Colonialism, History and the Construction of Place: The Politics of Landscape in Northern Australia" in Barbara Bender (ed.) *Landscape Politics and Perspectives* Berg, Providence/Oxford, 1993, p.230.

[94] Sandra Harding *The Science Question in Feminism* Open University Press, 1986, p.164, quoted in Vron Ware *Beyond the Pale - White Women, Racism and History* Verso, London & NY, 1992, p.235.

Ideas and language from non-indigenous sources strive to describe and explain indigenous relations to land, using western language and constructions to approximate an indigenous conception of land. For example, the anthropologist Nancy Williams provided a detailed response to Blackburn's ruling in *Milirrpum*. She refers to the Yolngu's "land tenure system" as if Blackburn might have recognised this language. Indeed, Williams' title - *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* - suggests a representation of Yolngu relationships to land overtly designed to be compatible within the language and mechanics of property law.[95] In anthropological terms, Williams may have come closest to translating and interpreting a Yolgnu land system. However, this is not necessarily a boost to land rights. Indeed, Williams' scholarship emphasised a system of land ownership not obviously compatible with Australian property law.

Paul Carter's 'spatial' interpretation aims to clarify differences between non-indigenous and indigenous conceptions of boundaries (although he uses Tindale in this endeavour):

> Rather than regard the track as a neutral boundary bordering territories, it might make more sense to see it as a corridor of legitimate communication, a place of dialogue, where differences could be negotiated. Boundaries may themselves have been significant narratives. The track itself, replete with mythic as well as human meaning, may have been a form of communication. In this context, there is a certain poignancy in the idea of the white pioneer ignoring the route itself and casting his eyes instead, left and right, towards the kind of space that spoke to **him**.

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[95] Nancy M. Williams *The Yolgnu and their Land: A System of Land Tenure and the Fight for its Recognition* Australian Institute of Aboriginal Studies, Canberra, 1986, passim, but especially chapters five, ten and eleven.

> *Against this background, white invasion was a form of spatial writing that erased the earlier meaning.* Settlement then became a question of giving back to a desolated, because depopulated, land a lost significance.[96]

For readers, the historical perspectives of Reynolds and Blainey can co-exist despite their differences. It may also accommodate a conception of indigenous land, but it comes no closer to encapsulating it. Indeed, I question that Western epistemology needs to pursue such an endeavour.

In any case, it is not clear that Carter's 'spatial history' transcends the limitations he identifies in Reynolds. Certainly, he disseminates knowledge in a different way to Reynolds - his attention to relating language and geography, and his desire to deconstruct meaning is challenging and decisive. However, even if we adopt Carter's vision of land, we cannot avoid a picture of an Australian land tenure map. Carter states,

> We need to disarm the genealogical rhetoric of blood, property and frontiers and to substitute for it a lateral account of social relations, one that stresses the contingency of all definitions of self and the other, and the necessity always to tread lightly.[97]

However, one effect of Carter's use of language is to distance land from our contemporary political situation. Indeed, in the political context of land rights, Carter's deconstruction becomes obtrusive. Language is limited when it is used to undermine cultural differences. Indeed, language is subject to change within Western culture given that the concepts in question spread across several centuries of multi-faceted history and across philosophical, legal and political streams.

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[96] Carter, p.165; "**him**" is Carter's emphasis, the sentence beginning "*Against this background*" is my emphasis.

[97] Paul Carter *Living in a New Country - History, Travelling and Language* Faber, London & Boston, 1992, p.8.

**interpretations of 'site'**

How useful are new descriptions, new words - or altered meanings to old words - in the context of depicting the Australian landscape? It is necessary to use language that allows for different interpretations to be drawn from, or superimposed over the land. Whatever the term - site, place, space, estate, area, country - the meanings are subject to different and possibly incompatible constructions.

For example, uses of the term 'site' indicate how words can be applied differently and that meaning might be as constricted or expansive as the interpreter intends. 'Site' tends to refer to a distinctive feature affecting a small piece of land. However, among the definitions of 'site' in the *Oxford English Dictionary* is the following:

> The ground or area upon which a building, town, etc., has been built, or which is set apart for some purpose. Also, in mod. use, a plot, or number of plots, of land intended or suitable for building purposes, and, in wider use, a piece of ground or an area which has been appropriated for some purpose.[98]

'Site' is therefore versatile, as in ambiguous - the location in question could refer to anything from a water-hole to the Australian nation-state, and is therefore no more immune from enclosure by topographic and conceptual boundaries than any other description of land.[99]

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[98] *Oxford English Dictionary* (prepared by J.A. Simpson and E.S.C. Weiner) Vol.15, Clarendon, Oxford, 1989, p.562, def. 3.a.

[99] "It is by keeping open the possibility of another meaning, of another position emerging, that ambiguity assumes its responsibility." Paul Carter *The Sound in Between - Voice, Space, Performance* New South Wales University Press and New Endeavour Press, Kensington and Strawberry Hills, 1992, p.17.

The perception of 'site' in the context of the *Australian Heritage Act 1975* is limited. The *Australian Heritage Commission Act 1975* requires a Heritage Commission to identify and register significant places in what was termed a Register of the National Estate. Such a place is

> a component of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historical, scientific or social significance or other special meaning for future generations as well as for the present community.[100]

Archaeologist John Mulvaney adds that

> Aboriginal places also may be assessed for Register listing on the quality or representativeness of their cultural and/or environmental features. These may include traditional sites of significance, when nominated by or with the approval of local Aboriginal communities; places showing artistic creativity, such as rock paintings; sites of potential or demonstrated scientific and archaeological importance; and contact sites, those places which symbolise or exemplify interaction between Aborigines and other races.[101]

Mulvaney's approach to contact history locations employs the limiting definition of the Act:

> These studies are an outsider's version of some of these interactions, set into place and time. The existence of a visible and definable place meriting listing in the Register of the National Estate is a prerequisite for inclusion . . . [102]

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[100] *Australian Heritage Commission Act 1975* (Cth) with amendments, s.4.(1)
[101] D.J. Mulvaney *Encounters in Place - Outsiders and Aboriginal Australians 1606-1985* University of Queensland Press, St Lucia, 1989, p.xvii.
[102] *ibid.* p.xvi.

In summarising the account of fifty-seven "contact" places, in or proposed for the Register of the National Estate, Mulvaney fixes the moment of contact history: "As an approximation, seven chapters concerned Australia before 1800, six prior to 1850, eleven in the period 1850-1900, while eight belonged to this century."[103]

One limitation of such legislated place identification is that it submits to sanctioned memories. Mulvaney's discussion of Aboriginal "protocol" is instructive here. He argues that "Many instances of Aboriginal antagonism *doubtless* resulted from European violations of traditional behaviour".[104] The implication is that we need to explain away incidents that Europeans claim were unprovoked. A properly arranged contact is in turn a contact without stress, although still with extinguishing power. However, this can also be inverted; Reynolds suggests that the belief among some Aborigines that Europeans were ghosts had an impact on why Aborigines accepted intrusion, when they may not have from other Aborigines.[105]

Pre-contact indigenous tradition connects to modern indigenous tradition, but if the connection between past and future is not made then the 'tradition' given validity is that of the past. Therefore, if a narrow 'site' is to be protected through heritage legislation, that 'site' is often of historical significance. At the same time, some degree of heritage-based influence over the land may persist even when (or sometimes because) extinguishment is confirmed (see chapter five).

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[103] *ibid.* p.231.
[104] *ibid.* p.2, my emphasis.
[105] Reynolds *Other Side of the Frontier* p.31.

When it is concluded that land is conceptually viewed too narrowly, efforts are made to broaden definitions. For example, Frow and Morris visualise an intellectual 'site' which has connotations for an expansive and deliberately ambiguous description of land:

> Instead of the 'total social phenomenon', the corresponding subject for cultural studies is perhaps that of the 'site' (the point of intersection and of negotiation of radically different kinds of determination and semiosis), while 'expresssion' is displaced by the concept of 'event' (a moment of practice that crystallises diverse temporal and social trajectories). [106]

Similarly, Duncan suggests an intentional ambiguity that enables site to represent both a geographical place and the "site (the geographical, cultural, political, theoretical viewpoint) from which that representation emanates".[107] This ambiguity transcends a chronology that might see an area of land as 'unsettled', then part of the 'frontier', then 'settled'. However, an ambiguous approach may not be compatible with political expediency associated with problem solving.

This concept - or accumulation of concepts - of site embraces the continuing economic and social histories that have contributed largely to the reshaping of those ideas for anyone with an interest in a particular site. The "in between" landscape suggested by Morphy, and the "in-between" people and language suggested by Carter need not be situated only along a delineated boundary.[108] If land (or water) is conceptualised in terms of social, political and economic interactions, then 'site' becomes no more static than those interactions.[109] When

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[106] Introduction to John Frow and Meaghan Morris (eds.) *Australian Cultural Studies - A Reader* Allen and Unwin, St Leonards, 1993, p.xv.
[107] James Duncan "Sites of Representation - Place, time and the discourse of the Other" in James Duncan and David Ley (eds.) *Place/Culture/Representation* Routledge, London and New York, 1993, p.39.
[108] Morphy, p.205; Carter *The Sound In Between* p.21.
[109] Doreen Massey "Power-Geometry and a progressive sense of place" in John Bird *et al* (eds.) *Mapping the Futures - Local Cultures, Global Change* Routledge, London and NY, 1993, p.66

ambiguity accommodates different conceptions of land, it also allows for contradictions to remain.

When this is then related to land, to continue with the example of 'site', an important issue becomes how expansive government or legal institutions can be in responding to those broader definitions. That is not to say that a more fixed idea of 'site' is benign - it is equally politically active , precisely because it may limit 'solutions' to the overly-simplistic. Discussing topography, Duncan and Ley argue that,

> Its theoretical reach even extends beyond the edge of settlement to empty tracts of land. Topography is also therefore a science of domination - confirming boundaries, securing norms and treating questionable social conventions as unquestioned social facts.[110]

If conventional cartography visualises and authenticates a 'settled' perspective of land, I suggest that connections can be made between such processes and generalised interpretations of indigenous relationships to land, particularly when visualised in map form. For example, while tenure boundaries reflect property rights, they also conceptualise a place.[111] Just as the topographical "power of observation" enables a blank map to be filled[112], so the power of historical observation, through the language used and the assumptions accepted, can also confirm and rationalise. This appropriating delineation of land connects to constructions of Aboriginality (see chapter four).

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[110] Introduction to Duncan and Ley, p.1.
[111] Massey, p.67.
[112] Duncan and Ley, p.2.

How do notions of 'site' intersect? A translated indigenous concept of ownership - *they* claim meaningful attachment to *that* site - must not only be knowable but must be viewable, and therefore able to be enclosed and settled. A 'spatial' notion of land and history - with its ambiguity, its expansiveness, its openness to different cultural meanings - can remain a stable theoretical idea so long as those cultural meanings do not engage. Co-existing conceptions of the land is one thing; political rights stemming from that is another. Heritage preservation may potentially serve more than one task - to preserve an important aspect of the land, while at the same time opening up other areas of land to change. While a concept of 'timelessness' v. 'progress' is apparent, the extent to which this can be overcome depends in turn on what is perceived to be the *legitimate* basis for ongoing 'traditional' attachment. In that context, an idea of settlement which was not benign but tumultuous and destructive might act to re-arrange history but also to confirm the effects of benign settlement: a stable, propertied nation-state. Therefore, when the idea of 'appropriation settlement' being benign is challenged, the consequences of that settlement - perceived dispossession and loss of tradition - may be affirmed. Native title potentially persists - and potentially is extinguished.

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In terms of a dispute over a certain area of land, there is a power involved in deciding *who determines* ongoing traditional attachment. If pre-conceptions about who "the Aborigine" was, is and can be are to influence opportunities to retain/regain attachment to land, then it is not only ideas about "the Aborigine" that contribute but also assumptions about Australia as settled. An idea of place is an attempt to enunciate this, to include it in any discussion of land and, by

extension, to attempt to find ways to react to indigenous traditions rather than shape and re-shape them. The above discussion of frontier suggests both that incremental, visual settlement is a valid view of the physical and conceptual emergence of Australia, and at the same time that such a view is narrow. This leads to the conclusion that any attempts to find new meanings for landscape traversing this contested terrain will have the effect of entrenching the contest.

## Chapter Four

## Land rights and Aboriginality

### from traditional to assimilated to traditional

In Australia, appropriation settlement occurred and occurs incrementally, reflecting consumption of land by non-indigenous property, possessions and ideas. The evolution of concepts of Aboriginality reacts to but also defies settlement. Once land is encroached upon, indigenous adaption to new circumstances is inevitable. Comfortable or celebratory attitudes to appropriation settlement, and its consequences for Australian society and property law, must co-exist with dynamic ongoing indigenous cultures that are unlikely to conform to benign attitudes for the benefit of others.

While representations of Aboriginality existed in Britain prior to 1788, initial concepts of Aboriginality arrived in Australia with British law:

> Before Cook and Phillip, there was no 'Aboriginality' in the sense that is meant today . . .. The term Aboriginal', and the colonial and post-colonial implications of the concept, began to take shape in Australia to some extent in 1770, but more so in 1788.[1]

Following *Mabo*, this leads to new questions; how and in what sense have indigenous peoples in Australia maintained relationships with land during appropriation settlement? If we see contact histories and concepts of settlement as

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[1] Marcia Langton *'Well, I heard it on the Radio and I saw it on the Television...', An essay for the AFC on the politics and aesthetics of filmmaking by and about Aboriginal people and things* Australian Film Commission, North Sydney, 1993, p.32.

reflecting interaction and mutual change, then it may also be that ideas are superimposed over land whether or not such differences are compatible.

Conventional notions of Australian land as 'settled' connect directly to popular depictions of indigenous peoples[2], in that those Aborigines living in 'remote' Australia remain more 'traditional'. If indigenous peoples are required to demonstrate ongoing traditional attachment by some display of the 'authenticity' of their Aboriginality, it is vital to ask who determines the nature and criteria of Aboriginality. In Australia various representations of Aboriginal people have shaped attitudes and policies which have in turn reformed or reinforced such representations. In this context, attempts may be made to describe either 'traditional' culture, or indigenous relations with the state (or some combination of both).[3] McCorquodale states

> From my analysis of 700 separate pieces of legislation dealing specifically with Aborigines or Aboriginal matters - or other seemingly non-Aboriginal matters - no less than 67 identifiable classifications, descriptions, or definitions have been used from the time of white settlement to the present.[4]

Beckett states that with the development of the nation-state, the status of Aborigines has become a 'problem' requiring a 'solution':

> For its part, the state is so inextricably bound up with the Aborigines, politically and administratively, that is cannot easily disengage; rather, each effort to solve the problem binds the two closer together. The

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[2] Muecke *Textual Spaces* p.2.
[3] Tim Rowse After Mabo - Interpreting indigenous traditions Melbourne University Press, Melbourne, 1993, p.57.
[4] John McCorquodale *Aborigines - A history of law and injusice, 1829-1985* unpub. PhD thesis, University of New England, 1985, p.24.

> implication of this is that the state is an integral part of the problem it is supposed to be solving.[5]

Such difficulties also occur in intellectual inquiry - for example, Hollinsworth provides an overview a past generalisation of Aboriginality, noting both that discourses have been "multiple, shifting and contradictory" but also that a "narrow and static concept of 'traditional' culture" has dominated since the 1940s.[6] He then discusses the merits of three alternatives to this dominating representation - "biological descent ('blood'), cultural persistence and political resistance".[7] Mudrooroo provides the criticism that Hollinsworth predicts, suggesting that "We must determine our own identity within the parameters established by us".[8]

In this chapter, I discuss non-indigenous depictions of Aboriginality, in terms of the perceived 'development' from 'traditional' to 'assimilated', and in the context of ongoing rights to land. As is the case throughout this thesis, I emphasise that one contribution to a comprehensive conception of land rights can be made by attention to tenets and assumptions regarding non-indigenous identity *in the context of a continuing indigenous presence.* It is this aspect of the representations of Aboriginality that I discuss; although the debate represented above by Hollinsworth and Mudrooroo is a critical one, here I am more concerned to explore the relationship between concepts of Aboriginality and the issue of land rights. The previous chapters have focused on this question in the context of

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[5] Jeremy Beckett "Aboriginality, Citizenship and Nation State" *Social Analysis* No.24, December 1988, p.3.
[6] David Hollinsworth "Discourses on Aboriginality and the politics of identity in urban Australia" *Oceania* Vol.63, No.2, December 1992, p.138.
[7] *ibid.*
[8] Mudrooroo Nyoongah "Self-determining our Aboriginality, A response to 'Discourses on Aboriginality and the politics of identity in urban Australia" *Oceania* Vol.63, No.2, December 1992, p.156. See alo Eric Michaels *Aboriginal Invention of Television - Central Australia 1982-86 Report of the Fellowship to assess the impact of television in remote Aboriginal communities* AIAS, Canberra, 1986, p.4.

limitations imposed by property systems in Australia. This chapter connects Australian ideas about land with Australian characterisations of Aboriginality.

Ideas of 'traditional' or 'assimilated' indigenous societies are compatible with a Lockean concept of property that makes the land valuable when it is 'productive'. However, the suggestion that indigenous peoples in Australia should either be 'assimilated' or remain in a 'traditional', as in hunter-gatherer, existence is being rejected or partially rejected by much of the official discourse and policy emerging from elements of the Australian state. Nevertheless, while principles such as domestic self-determination - manifested for example in the formation of the Aboriginal and Torres Strait Islander Commission (ATSIC) - espouse distinct indigenous culture within the nation-state, I suggest that the traditional (primitive) - assimilated (civilised) division remains powerful. However, such perceptions of Aboriginality are undermined once it is acknowledged that despite considerable changes Aboriginal identity persists and indeed prospers, but it remains possible to simultaneously adopt (as opposed to enact) principles of self-determination and equality of opportunity.

The terms 'assimilation' and 'tradition' bring with them loaded histories and disparate meanings. They involve complex and interrelated qualities stemming from myriad sources which have transformed and diversified. While I attach general meanings to both terms, those meanings are intended as language montages reflecting contentious rather than fixed, obvious meanings. However, it is precisely this controvertibility of language that allows limited definitions to reinforce and be reinforced by narrow institutional responses.[9]

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[9] Fay Gale *A Study of Assimilation - Part-Aborigines in South Australia* Adelaide, Libraries Board of South Australia, 1964, p.xix.

In terms of writing and presenting traditional Aboriginal societies to the interested others, Ronald and Catherine Berndt's *The World of the First Australians* is considered (by them and others) a "classic" anthropological text[10], although as Cowlishaw notes it dealt mainly with Aborigines from the north and centre (that is, from 'remote') Australia.[11] The Berndts denote 'traditional' as cultural practices as they existed prior to the impact of colonisation: "This was how life was lived before the coming of Europeans, or before European influence drastically modified it".[12] They acknowledge the difficulties involved in such description:

> But 'traditional' and 'indigenous' are ambiguous and relative terms. In regard to disease and health, as well as to so many other features of Aboriginal life, we cannot speak with any certainty of what happened before outside contact. The traditional past, what people say or believe happened long ago, need not be the same as the historical past, the past as it actually happened, but for much of Australia it represents all the evidence we have.[13]

This involves a privileging of the "historical past" - that is, Western information and interpretation collated from empirical research - which both insufficiently questions the neutrality of that type of history and lessens the significance of indigenous ways of producing knowledge. This does not invalidate the production of reconstructive anthropological knowledge. However, post-*Mabo* such literature will inevitably be read with the question of extinguishment of native title in mind.

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[10] R.M. Berndt and C.H. Berndt *The World of the First Australians* Ure Smith, Sydney, 1964, 2nd ed. 1975, p.viii; Duncan Graham *Being Whitefella* Fremantle Arts Centre Press, South Fremantle, 1994, p.185.
[11] Gillian Cowlishaw "Colour, culture and the Aboriginalists" *Man* Vol.22, No.2, June 1987, p.231.
[12] Berndt and Berndt, p.xv (Foreword to First Edition).
[13] *ibid.* p.16.

Anthropologically, I suggest that - apart from an acknowledgment that those societies who have 'ceased to exist' are unknowable[14] - the more 'traditional' a contemporary society is perceived to be, the more comfortably 'knowable' it is. This means also that the less 'traditional', the more politically and logistically complicated indigenous identity becomes, should those asserting it seek to privilege an indigenous component over assimilated values and characteristics. Indeed, a narrow interpretation of assimilation would suggest that resorting to any modern 'tactics' to assert a traditionally-based Aboriginality is contradictory, indeed impossible. I argue that it depends how *Mabo* is interpreted whether or not its principles support such a narrow conception. In turn, that interpretation is influenced by the extent to which interpreters are prepared to challenge predominant non-indigenous ideas about land and identity.

Although the influence of *The World of the First Australians* is unmeasurable (especially in comparison to texts and popular literature of various eras of Australian history[15]), Muecke suggests:

> It is a book which occupies a privileged position within the tertiary curriculum, functioning to specify what will count as knowledge of Aborigines within a department of Anthropology or Aboriginal Studies. This text also is articulated to other practices of commentary (for example, the discourses of history, sociology or the law); consequently, to criticise the formulations offered in the book is a step towards understanding the position it occupied in the curriculum at that time.[16]

In a political sense, land rights stemming from indigenous relationships to land rely heavily for determination on anthropological research - this political aspect

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[14] *ibid.* p.xi.
[15] Adam Shoemaker *Black Words, White Page - Aboriginal Literature 1929 - 1988* University of Queensland Press, St Lucia, 1988, pp.50-53.
[16] Muecke, p.25.

exists even (or perhaps especially) with research not conducted and texts not written with land rights determinations in mind. Muecke's critique of (selected parts of) the Berndt's table of contents does, as he suggests, "reveal the obsessions of the discourse of Anthropology", and suggests a fixed (and fixated) correlation between traditional and mythical.[17] While effective, Muecke's approach is limited, especially when it does not acknowledge that assumptions about Aborigines may persist even when they are identified as misconceived. This is particularly so when anthropology adopts a translatory component from indigenous and western legal conceptions of land, but for the determination of western-based questions of ownership.

## land and identity

It is frequently stated that traditional Aboriginal cultures are characterised by intricate relationships with land. Berndt and Berndt state that

> Australian Aborigines - in the past, and in the present insofar as traditionally-oriented people are concerned - had a special view of their natural environment. They were intimately familiar with everything within it, and the life they led demanded that they should have this detailed knowledge. They also believed that they shared the same life-essence with all the natural species and elements within the environment. Their social world was expanded to include the natural world. Conversely, their natural world was humanized, and this was true for the land as such.[18]

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[17] *ibid.* p.26.
[18] Berndt and Berndt, pp.136-137.

However, awareness of the holistic relationship between Aborigines and land can be used to confirm dispossession. For example, A. Grenfell Price depicts the permanent destruction of Aboriginal society wrought by appropriation settlement:

> The outstanding feature of native life, *and that which contributed very largely to its destruction*, was the intimate association between the local group and its territory. The natives had divided Australia into tribal areas with clear cut boundaries, and each group hunted its own territory and rarely trespassed on those of others. Even more important was the fact that the tribal lands were the basis of religious and social life . . .. Hence, when the whites robbed the natives of their land, they not only destroyed the living resources to which they were accustomed, *but they destroyed their spiritual past and present, and their spiritual hopes for the future.*[19]

In this version of contact history, it is because Aborigines conceive of land ownership in ways distinct from Western land use and property law, and because the intricacies of those conceptions are so open to external disruption, that dispossession of identity as well as land occurs. Contact histories which highlight dispossession potentially offer reinforcement to institutional disempowerment, in that ongoing traditional attachment is removed. While attempts have been made from within mainstream Australia to transcend the traditional/assimilated dichotomy, a theoretical espousal of indigenous rights to land is limited if attention is not given to existing theoretical and institutional barriers.

Tasal Asad states that

> since the eighteenth century, it has not been common to find Western writers expressing the need to *explain* processes of Europeanization and

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[19] A. Grenfell Price *White Settlers and Native Peoples* Georgian House, Melbourne, 1949, p.103, my emphases.

> secularization as opposed, that is, to *describing* them. The reason is that those processes are taken to be natural.[20]

Crucial to the doctrine of native title is the tenet that traditional attachment to land may persist beyond the 'natural' processes of Europeanization. If such processes are explained as well as described, this allows for representations of Australian society to be problematised, which complicates further a picture already disrupted by the questioning of representations of Aboriginality. For example, Asad's statement must be qualified immediately; some important 'secular' tenets of Australian society - property, for example - are often sustained, indeed revered, in religious or mythological language.[21] This paradigm reflects Western perception of the ideal society which can be described in almost religious tones:

> Belief in the stable state is belief in the unchangeability, the constancy of central aspects of our lives, or belief that we can attain such a constancy. *Belief in the stable state is strong and deep in us.* We institutionalize it in every social domain. We do this in spite of our talk about change, our apparent acceptance of change and our approval or dynamism . . .. Belief in stability is a means of maintaining stability, *or at any rate the illusion of it.* The more radical the prospective change, the more vigorous the defence - the more urgent the commitment to the stable state.[22]

The extent to which land rights can be deemed acceptable relates to the extent of the appeal to an economic imperative. During the (often media-driven) debate over the federal Native Title Bill, Western Australian Premier Richard Court

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[20] Tasal Asad "Afterword - From the History of Colonial Anthropology to the Anthropology of Western Hegemony" in George W. Stocking Jn. (ed.) *Colonial Situations - Essays on the Contextualization of Ethnographic Knowledge* University of Wisconson Press, 1991, p.318.

[21] Similarly, Christianity has been incorporated into the Aboriginality of many contemporary indigenous communities.

[22] Donald A. Schon *Beyond the Stable State - Public and Private Learning in a Changing Society* Temple Smith, London, 1971, p.9, 11, my emphases.

demonstrated in his public comments a context tied directly to economic imperatives. Court criticised the federal bill in the following terms:

> The uncertainty, administrative delays and the costs which would arise from the Commonwealth legislation would deter investment and result in job losses and a reduction in export income for the nation . . .. The [federal] legislation would also have a deterrent effect on the development of new industries, including value-adding industries.[23]

The Western Australian *Land (Titles and Traditional Usage) Act 1993* extinguished any native title which had not previously been extinguished:

> the members of an Aboriginal group who held native title . . . become entitled to exercise rights of traditional usage in relation to that land under and subject to this Act.[24]

Tradition is therefore determined not only by limited and fixed perceptions of what Aboriginality is and can be, but also of how it can persist without disrupting non-indigenous imperatives - in this context, I suggest that it is perceived that land rights are appropriate for 'noble savages', with the proviso that these rights persist in areas of Australia where the land and people are able to replicate the depictions of pre-contact indigenous culture. Conversely, in 'settled' Australia, as well as asking if Aboriginal traditions are valued, it is also necessary to determine if they are believed.

In *State of Western Australia v Commonwealth* the High Court ruled that the Western Australian Act was invalid as it was in breach of the *Racial Discrimination Act 1975*.[25] Veronica Brady suggest that while the history of Western Australia has

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[23] Premier of Western Australia *Media Statement* P89/274, 3/12/93, p.1.
[24] *Land (Titles and Traditional Usage) Act 1993* (WA) s.7.1(b). See also Premier of Western Australia *Media Statement* P93/253, 4/11/93, p.1, and P93/273, 2/12/93.
[25] State of *Western Australia v Commonwealth* 128 ALR 1, at 28, 35,73.

been influenced by isolation and the difficulty of economic development, there remains "implicit and explicit racism" and "the Canute-like irrationality of the anti-*Mabo* lobby".[26] However, as with the history of Geoffrey Blainey, I argue that while Court's approach might be easily critiqued it is not so easily dismissed. Appeals to the national interest over land rights can be simply but compellingly stated:

> The Executive Director of AMIC, Mr Lauchlin McIntosh, said research conducted for the mining industry showed that while most Australians were concerned that Aborigines and Torres Strait Islanders be treated fairly, they did not want the economy damaged to achieve this.[27]

This economic certainty relates to the ability to use the land freely, that is, to develop the land during continuing appropriation settlement:

> Many businesses, especially mining, forestry, farming, petroleum, fishing and tourism, require secure title to the area in which they operate. This security is fundamental to their forward planning, to their ability to raise capital from investors and loans from banks and other financial institutions.[28]

A full page newspaper advertisement in the Australian in the week after the 1993 federal Budget argued

> If we stop looking for our minerals, more people will have to start looking for jobs . . .. The Australian Mining Industry supports one Australia for all Australians. But the question is this. Doesn't every Australian deserve the right to a job?[29]

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[26] Veronica Brady "State of Shame" *Age* 25 October 1993, p.13.
[27] Australian Mining Industry Council *AMIC Releases Summary of Draft Bill* Media Release, 5 August 1993.
[28] *Mabo - Native Title and the Community* A paper prepared for the Australian Chamber of Commerce and Industry and six other industry associations, 24 June 1993, p.2.
[29] *Australian* 17 August 1993, p.7.

While perhaps crude, the above examples do not disappear from public discussion simply because academic discourse deconstructs certain descriptions of Aboriginal culture, while legal discourse constructs native title and historicism 'disproves' the doctrine of *terra nullius*. A comparison of 'primitive' and 'civilised' has continued (in changing ways) past the moment of sovereignty acquisition, and indigenous peoples have often been seen as either conforming to generalised 'traditions', or as embracing 'progress' - or having 'progress' embrace them - through processes of assimilation. One tenet of the stable Australian state is commitment to 'progress' - a belief in betterment appears to exist simultaneously with a belief in stability. Coupled with espousals of equality of opportunity, these beliefs request limits on the rights of distinct groups within a society. Importantly, these beliefs exist *within* sovereignty, therefore reflecting a second level of alternative rights that must be reconciled with notions of distinct indigenous rights.

In their monumental anthropological work *A World That Was - the Yaraldi of the Murray River and the Lakes, South Australia*, Ronald and Catherine Berndt attempt to describe a pre-contact traditional Aboriginal society. The Berndts distance themselves from offering any kind of contact history, stating that "Our emphasis is rather on the oral history and cultural heritage of Aborigines with whom we worked".[30] However, this apparently timeless 'traditional' period supposes changelessness, despite the fact that their principal informants, Albert Karloan and Pinkie Mack, lived through an era of enforced change and disruption.

Moreover, I suggest that attention to non-indigenous contexts further qualifies the apparent simplicity of the Berndts' approach. They conducted their fieldwork

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[30] Ronald M. Berndt & Catherine H. Berndt *A World That Was - the Yaraldi of the Murray River and the Lakes, South Australia* Melbourne University Press at the Miegunyah Press, Carlton, p.1.

more than a century after initial encroachment, and coming after a period of protection when assimilation of 'part-Aborigines' was a legislated aim of the South Australian government.[31] Indeed, the Berndts' research was conducted for their 1951 book on assimilation, *From Black to White in South Australia.* In this, they advocated better methods of assimilation, stating that

> Europeanisation is inevitable, where the minority group is so small and offers no serious hostility. But the methods by which this is being accomplished are producing people who are not encouraged to make any important contribution to general community life, except as isolated individuals divorced from all their aboriginal affinities; who are likely to absorb superficial rather than deeply-rooted elements of white culture; and who tend to become identified (if at all) with the slum-dwelling white population, or with the social "outcasts" of that society.[32]

That the fieldwork for *A World That Was* was conducted over fifty years before the book was published gives the text a curious sense of duality, of this being both a formative and a mature work, but also of it being representative of two distinct theoretical eras in both public policy direction and academic depictions of Aborigines. Nevertheless, as a text focusing on a 'traditional' Aboriginal society, it cannot be divorced either from the shift from a policy of assimilation to one of rights, or from the developments in land rights debates, particularly since the early 1970s. Can the Berndts privileged position as receptors and reconstitutors (and copyright holders) of this knowledge be separated from the process of cultural assimilation? Although all political perspectives cannot be included in one book, and the authors clearly acknowledge the limited parameters, a book

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[31] The fieldwork was conducted in 1939 (Ronald Berndt) and 1942 and 1943 (Ronald and Catherine Berndt).

[32] Ronald and Catherine Berndt *From Black to White in South Australia* Cheshire, Melbourne, 1951, p.275.

such as *A World That Was* will be authoritative in any consideration of ongoing traditional attachment to land in the Lower Murray.

In the time elapsed between fieldwork and the publication of *A World That Was*, policies of assimilation have been set aside, and the word itself has slipped from Australian political language. However, I suggest that the social and conceptual consequences of assimilation are not so languidly displaced. 'Assimilation' is a complex term, coming in many interrelated forms - processes, legislation, theories, policies.[33] The fundamental proposition - *to make alike*, in this case to make Aborigines resemble Europeans - denies concepts of ongoing, identity-based rights for indigenous peoples. Social assimilation reflects the "acceptance and integration into the life of the general community".[34] As such, assimilation would eliminate ongoing traditional attachment.

The anthropologist William Stanner has argued against such a conclusion, suggesting that while the facts of Western presence are observed (and aspects of Western culture are practised), these are being "taken into account in working out their alternative system".[35] Writing in 1958, he suggests that tradition does not collapse but transforms into something new but nevertheless indigenous. Speaking to anthropologists, he asks "Have we truly understood the process by which the modern Aborigines are, to some extent at least, transforming themselves as well as being transformed by things beyond their control?"[36] Stanner quotes

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[33] Paul Hasluck *Shades of Darkness - Aboriginal Affairs 1925-1965* Melbourne University Press, Carlton, 1988, p.70, makes the distinction between the destination and the policy - therefore policies aimed at assimilation rather than policies of assimilation.
[34] Gale, p.xxi, 201.
[35] W.E.H. Stanner "Continuity and change among the Aborigines" *White Man Got No Dreaming - Essays 1938-73* ANU Press, Canberra, 1979, p.42.
[36] *ibid.* p.46.

Myrdal stating "Scientific facts do not exist *per se*, waiting for scientists to discover them" and then adds:

> Each such fact is [quoting Myrdal] "a construction abstracted out of a complex and interwoven reality by means of arbitrary definitions and classifications". The theoretical reworking of a great deal of our knowledge of the past is now very necessary . Incidentally, it does not greatly matter from this viewpoint if the traditional way of life has vanished.[37]

Under cross-examination in the *Milirrpum* hearings, Stanner was asked to re-affirm this concept, leading the Solicitor-General to suggest "So that involved in your, and indeed in any anthropologist's conclusions, because of the restrictions of his knowledge of actual fact, is a great deal of theory".[38]

A political discussion centring on ongoing traditional attachment needs to consider the difference between 'loss' of Aboriginality and perceived loss of Aboriginality. For instance, according to the South Australian *Aborigines Act Amendment Act 1939* an Aborigine was any full-blood or "less than full-blood" person descended from the original inhabitants of Australia, except that

> In any case where the board is of opinion that any aborigine by reason of his character and standard of intelligence and development should be exempted from the provisions of this Act, the board may, by notice in writing, declare that the aborigine shall cease to be an aborigine for the purposes of this Act. Any such declaration may be made by the board

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[37] *ibid.* p.65.

[38] "Cross-Examination: W.E.H. Stanner versus the Solicitor General of Australia" in Robert Paine (ed.) *Advocacy and Anthropology* Institute of Social and Economic Research, Memorial University of Newfoundland, 1985, pp.184-85.

> whether or not an application is made by the person to whom the declaration refers.[39]

The definition of 'Aborigine' referred to those indigenous peoples living 'traditionally' - those who were well-assimilated ceased to be *original* and, under legislation, to be Aboriginal. As the Berndts stated, the legal definition of Aboriginal included those "who have not been completely absorbed into the Australian-white community".[40]

Just as effects of assimilation policies continue to impact on contemporary indigenous societies, so there is a repository of assimilationist knowledge which is not removed as easily as banishing a word from discourse. A comment by Tindale highlights the significance of knowledge:

> It seems probable that some folk who have aboriginal blood in their veins could not be proved to be of aboriginal descent within the meaning of the Act, while others with lesser amounts of aboriginal blood, by reason of their accidental preservation of a more complete genealogical history, might be compelled to admit their liability and be forced to seek exemption from the provisions of the Act before being able legally to regain the status they enjoy at present as "white" citizens.[41]

In order to not be subject to the confines of the Act, therefore, suppression of Aboriginality was expedient, although Clarke notes also that exemptions caused bitterness and division within Aboriginal communities.[42] It is apparent from this that political rights for Aborigines in the 1930s stemmed from avoiding

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[39] South Australia *Aborigines Act Amendment Act, 1939* No.14 of 1939, Government Printer, Adelaide, 1940, Section 11a.(1). This Act amended the *Aborigines Act, 1934* which was proclaimed to commence on 1 April, 1937.

[40] Berndt and Berndt *From Black to White* p.19.

[41] Norman B. Tindale *Survey of the Half-Caste Problem in South Australia* Results of the Harvard-Adelaide Universities' Anthropological Expedition, 1938-39, No.4, 1941, p.131.

[42] Phillip Clarke *Contact, Conflict and Regeneration: Aboriginal Cultural Geography of the Lower Murray, South Australia* unpub. PhD thesis, University of Adelaide, 1994, p.267.

traditionalism, and in themselves emerged from a era of policies of protection.[43] This is in direct contrast to the 1990s where Aboriginality has become a legitimate means to political rights rather than a liability, but here the place of indigenous rights within a liberal-democratic framework remains undetermined.

There was considerable official impetus for the assimilation policies which the Berndts observed in the early 1950s, emerging from debates in the 1930s, particularly from the 1937 joint Commonwealth and State Aboriginal Welfare Conference held in Canberra (and slowed by the impact of World War Two.[44] In this period, anthropologists were also reflecting on assimilation. Norman Tindale stated that "the aborigines of South Australia are a dying remnant", and the "half-castes who replace them" should be assimilated rather than segregated.[45] In this context, biological and social assimilation are connected due to the ability of white blood as well as white value systems to supersede their indigenous counterparts.[46] Of those indigenous communities living in South Australian deserts, Tindale concludes that their continued 'isolation' could be of economic benefit to South Australia.[47] Conversely, it is in 'settled' Australia, where Aborigines are the minority, that Tindale considers assimilation to be possible:

> It would appear that the most ready means of bringing about a process of physical and social assimilation of the Australian mixed blood into the community would be by the simple device of ensuring that a maximum dispersal or spread of the minority group will take place . . ..
> Where the population of half-castes is greater than the white population amongst whom they are living, such assimilation is, seemingly, entirely impracticable. In practice, therefore, areas such as the Broome district in

[43] Gale, p.62.
[44] Hasluck, pp.66-69; Clarke, pp.265-66.
[45] Tindale *Survey of the Half-Caste Problem* p.67.
[46] Tindale, p.67; also quoted by Gale, pp.250-251.
[47] *ibid.* p.68, 80.

> North-West Australia, a large part of the Northern Territory and the northern half of Queensland could not be subjected to this device with the same effect as would occur in settled districts of the south-east and southern parts of Australia.[48]

As with Tindale's work on boundaries (see chapter three) the identity-based knowledge produced by anthropologists such as the Berndts in *A World That Was* can be reshaped to make arguments about contemporary land rights. Indeed, if a text is considered authoritative, it might form one basis of an argument that rejects the likelihood of ongoing traditional attachment to a particular piece of land. For example, Geoffrey Partington argues that the existence of "women's business" relating to Kumarangk (Hindmarsh Island) seems implausible in part because it is not present in literature on the Ngarrindjeri. In particular he notes the absence of a discussion of this "women's business" in either the Berndts' *A World That Was* or in Catherine Berndt's (or any other) contribution to Peggy Brock's 1989 volume focusing on South Australia, *Women, Rites and Sites: Aboriginal women's cultural knowledge*. Partington recalls that "the Narrinyeri" described the Lower Murray apparently without gender specifics to the Berndts as "like a lifeline, an immense artery of a living 'body' consisting of the Lakes and the bush hinterland".[49]

Partington presents a limited view of 'site' (not unlike Mulvaney's in chapter three) which is not supported by the intention of the *Aboriginal Heritage Protection Act 1984*, as I discuss further in chapter five.[50] He also is selective in his use of sources for although he correctly points out that Catherine Berndt does not offer specific evidence of "women's business" he omits her argument that

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[48] Tindale *Survey of the Half-Caste Problem* p.119, 120.
[49] Berndt and Berndt *A World That Was* p.13, cited in Geoffrey Partington "Determining sacred sites - the case of the Hindmarsh Island Bridge" *Current Affairs Bulletin* February/March 1995, p.7.
[50] Partington, p.9.

> In the early 1940s both men and women, voicing their discontent with the restrictions and disadvantages they were experiencing, often raised the issue of their prior ownership of the land: not so much in terms of specific sites, but in terms of the larger, overall expanse of the country, the region that was special to them. This intermeshing of locality and ideas about locality continues to be a significant factor, which in one sense overrides or transcends the dimension of detailed site knowledge. A region represents to them an overall collection of sites that has its own emotional and identity-marking and economic ties with the distinctively Aboriginal past.[51]

More broadly, Ronald Berndt argues that maintenance of Ngarrindjeri identity, albeit altered, through continued identification with their kin and country of origin is "a remarkable achievement on their part, in the face of heavy pressures toward absolute assimilation into the wider system".[52] However, Partington is most concerned with the implications of the decision for the rights of indigenous against non-indigenous political rights in Australia:

> The undisclosed beliefs held by the Aboriginal women . . . are no doubt of a deep and sincere religious character. However, many other Australians hold deep and sincere religious beliefs and in many cases what one group sincerely believes is contrary to what others believe with equal sincerity. Why should the beliefs of these women have a status in government policy and the law of Australia far higher and more significant than beliefs, held equally sincerely, of many other Australians? Why it is that, whereas other groups would at least have to explain and justify their beliefs in a court of law or some other public arena, these women need divulge no information to the outside world about their beliefs?[53]

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[51] Catherine H. Berndt "Retrospect and Prospect - Looking Back Over 50 Years" in Peggy Brock (ed.) *Women, Rites and Sites* Allen and Unwin, Sydney, 1989, p.13.
[52] R.M. Berndt "Aboriginal Fieldwork in South Australia in the 1940s and Implications for the Present" *Records of the South Australian Museum* Vol.23, No.1, 1989, p.64.
[53] Partington, p.10.

This call for a religious and institutional fairness (which, as chapter five discusses, Partington also links to the process of reconciliation) is powerful and is historically present in state and society attitudes towards indigenous peoples in Australia. Assimilationist ideals are consistent with notions of equality.

In 1957, Jessie Street asked "How can we help them develop so that they can fit into our individualistic, competitive and profit-seeking way of life?" and concluded that "economic independence" was necessary for assimilation to be plausible.[54] The questions now being raised are more complex - how can we respond to "them" asserting rights based on ongoing relationships to land which are modern but also might reflect a reconstitution of a classically 'traditional' past? How do we respond to "them" if they pursue rights that affirm their distinctiveness within liberal-democratic structures designed in theory to promote individual equality?

A.P. Elkin's introduction to *From Black to White in Australia* indicates that there was a progressive element in some interpretations of assimilation:

> By the 1930s . . . it was realised that Protection Policies even failed to stop abuses, and therefore, partly as a result of anthropological understanding of the problem of contact, it was felt that a positive policy might lead to the saving and progress of the Aborigines. By the middle of that decade, a move towards positive policy became the order of the day. This was, in a sense, a revival of the early official attitude that the Aborigines were British subjects who should be civilised; for the aim, which has been growing in certainty during the past fifteen years, is Citizenship for the Aborigines.[55]

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[54] Jessie M.G. Street *Report on Aborigines in Australia*, unpub. paper, Sydney, p.10,7. Also cited in Gale, p.141.

[55] A.P. Elkin, Introduction to Berndt and Berndt *From Black to White* p.13.

Beneath these comments is a principle of equality through homogeneity. In contemporary political discourse a tension has developed between this kind of equality and one able to acknowledge difference. Referring to Queensland government policy, Noel Pearson states

> whilst a substantial change occurred in policies in the 1980s from inequality and difference to equality and sameness, both policies were discriminatory and were premised on a vehement denial of the notion of traditional rights to land.[56]

If land rights to are to be acknowledged by public policy, more serious attention is necessary to the impact of a concept of indigenous distinctiveness plus equality on Australian principles of land use, land ownership and related ideas of citizen rights.

**liberating Aboriginality?**

In recent Australian academic debate, particularly among some anthropologists and historians, attempts have been made to establish discourses challenging historical reinforcements of dominant imperial, colonial and national characterisations of indigenous peoples. This is not a one-dimensional critique - as Attwood suggests, "They made themselves as well as being made", but power remains in determining whose descriptions are legitimised.[57]

Further, this infers that although a clear delineation can be made between white dominator and black oppressed, the histories of European contact with Aboriginal

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[56] Noel Pearson "Mabo: Towards respecting equality and difference" *Voices from the land - 1993 Boyer Lectures* ABC, Sydney, 1994, p.94.
[57] Bain Attwood *The Making of the Aborigines* Allen & Unwin, Sydney, 1989, p.150.

communities are histories of interaction in which Aboriginal people are active participants. More than that, indigenous self-perceptions frequently do not conform to images of non-indigenous creators, but rather persist in ways that can challenge restitution policies.

Therefore, when asking what rights remain for dispossessed Aborigines, it is also important to ask why it is certain that those rights *are* extinguished. While the two-dimensional characterisation of Aborigines as 'traditional' or 'assimilated' may be invalid, challenging questions are raised about non-indigenous identity/ies. This is particularly so when they are confronted with concepts of Aboriginality which appeal to the traditional past, and are often made by indigenous people aware of the nation-state into which they were born as well as their ongoing indigenous relationships to land.

To conceptualise this, are 'new' ways of thinking required? Gillian Cowlishaw notes the emerging trans-discipline of "Aboriginal studies", where meaning is generated by examining methods of past research. She states that

> images and explanations of Aboriginal life were produced within the dominant institutions, particularly university anthropology departments as well as by museums, publishers, advertisers . . . for purposes quite outside Aboriginal society. The authority of such texts tended to silence the independent and discordant voices of those being represented, a process defined by Edward Said as Orientalism.[58]

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[58] Gillian Cowlishaw "Studying Aborigines: Changing Canons in Anthropology and History" in Bain Attwood and John Arnold (eds.) *Power, Knowledge and Aborigines* Special Edition of the *Journal of Australian Studies* La Trobe University Press in Asociation with the National Centre for Australian Studies, Monash Uni, 1992, p.20.

Attwood summarises the way that 'Aboriginalism', following Orientalism, has impacted on discourses on indigenous peoples in Australia relating to knowledge and power. Following Said's reliance on Foucault, he suggests that

> all knowledge is interpretive, that is, knowledge is not natural or already there, but is an artifice, an entity constructed or invented by human beings . . .. Second, all knowledge is contingent, that is, knowledge is neither timeless nor universal, but relative to circumstances and particular (or partial) . . .. Third, all knowledge is political, that is, it is constructed by relationships of power - of domination and subordination - and is inseparable from these.[59]

The questions Attwood suggests this leads to - "who produces this knowledge, when and where; about and for whom is this knowledge created; how and in what form is it produced; and what are the effects of this knowledge" - are similar to those I ask in relation to indigenous rights to land throughout this thesis.[60] To what extent, however, is the knowledge gained from such a tool prescriptive, as well as descriptive of past constructions? Dirks suggests that

> We are modern not only because we have achieved this status historically, but because we have developed consciousness of our historical depths and trajectories, as also our historical transcendence of the traditional.[61]

By this reckoning, the act of *being aware* of linear history becomes a reaction against the traditional. This places constraints on indigenous history - as opposed to history about indigenes - as being rooted in *pre*-history or having been modernised, with narrow ideas about what each 'era' might represent. Dirks argues that the debate over modernity is "little different" to that over tradition,

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[59] Bain Attwood "Introduction" in Attwood and Arnold, pp.i-ii. On 'Aboriginalism' see also Bob Hodge and Vijay Mishra *Dark Side of the Dream: Australian Literature and the Postcolonial Mind* Allen and Unwin, Sydney, 1991, p.27; Cowlishaw "Colour" p.221.
[60] Attwood "Introduction" p.iii.
[61] Nicholas B. Dirks "History as a Sign of the Modern" *Public Culture* Vol.2, No.2, Spring 1990, p.25.

since the terms feed off each other. Indeed, he argues that "The modern has liberated us from tradition and constantly conceives itself in relation to it".[62]

Peter Murphy argues that post-modernism is "postcolonial in its mentality", in that all rival discourses "must learn to give up imperialistic claims to dominate the field of knowledge".[63] Indeed, Murphy's description of postmodern politics as being regulated by multiplicity (particularly following Lyotard's suggestion that politics belongs to the sphere of opinions rather than knowledge[64]) appears directly relevant for indigenous issues in Australia:

> a postmodern politics would ensure that minorities developed in such a way that *no minority could ever become a majority, and, on the contrary, that all majorities became minorities. No minority could prevail over any other.*[65]

The certainty that postmodern politics would "ensure" that no form of knowledge would dominate others reflects a significant problem. While the complexities of formations of past Aboriginalities can be incorporated into postmodern discourses, such complexities are not so easily accommodated when critical description of the past is replaced with prescription for the future, as in the defining of Aboriginality.

Edward Said states that

> Mythic language is discourse, that is, it cannot be anything but systematic; one does not really make discourse at will, or statements in it, without first belonging - in some cases unconsciously, but at any rate involuntarily - to the ideology and the institutions that guarantee its existence. These

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[62] *ibid.* pp.27-28.
[63] Peter Murphy "Postmodern Perspectives and Justice" *Thesis Eleven* No. 30, 1991, p.124.
[64] Jean-Francois Lyotard and Jean-Loup Thebaud *Just Gaming* transl. by Wlad Godzich, Manchester University Press (1979) 1985, p.28; Murphy, p.118.
[65] Murphy, p.125.

> latter are always the institutions of an advanced society dealing with a less advanced society, a strong culture encountering a weak one. *The principal feature of mythic discourse is that it conceals its own origins as well as those of what it describes.*[66]

Dominant constructions can become institutionalised and therefore based on 'fact'. In what sense is the 'deconstructed Aborigine' immune to new characterisation? Deconstruction critiques Western knowledge[67], even without meaning or intent - it breaks down, but re-constructs, perhaps therefore providing new impositions. Moreover, in the determination of traditional attachment to land, are these more complex, organic ways of interpreting indigenous traditions and concepts of land a more, or less, useful means of securing legal and political rights?

While the 'traditional' - 'assimilated' option is itself constructed, it is also a product of colonial and nationalist thinking and beliefs, and with a history of institutional reinforcement. In *Domesticating Resistance,* Barry Morris employs a Saidean/Foucauldian critique to provide an historical and contemporary critique of the interaction between encroaching Europeans and the indigenous Dhan-gadi in what is now the Macleay Valley in New South Wales.[68] Foucault argues that "a will to knowledge" or "truth" is reliant on institutional support which in turn "tends to exercise a sort of pressure, a power of constraint upon other forms of discourse".[69] The western pursuit of knowledge and understanding can have constraining as well as liberating effects.

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[66] Edward W. Said *Orientialism* Vintage, New York, 1979, p.321.
[67] Robert Young *White Mythologies - Writing History and the West* Routledge, London and New York, p.17.
[68] Barry Morris *Domesticating Resistance: the Dhan-gadi Aborigines and the Australian state* Berg, New York, 1989.
[69] Michel Foucault "Orders of discourse - Inaugural lecture delivered at the college de France" *Social Science Information* April 1971, Vol.10, No.2, p.11.

Morris identifies his concern as to delineate the historical specificities of the Dhan-gadi's cultural encounters with colonial capitalism, stemming from a concern with the "politics of identity". Constructions of Aboriginality are linked directly to the status of the Dhan-gadi in the wider community; "Discourses about Aborigines pertain to the politics of race relations and in this they justify certain social relations and systems of power and control."[70] Cultural and political hegemony stemming from "the state's attempt to domesticate" the Dhan-gadi leads instead to forms of resistance that contribute to the evolution of a post-settlement Dhan-gadi culture.[71] Morris defines "formal egalitarianism" as requiring equality within the existing constructs of the dominant community - and therefore recognises that as political organisations such as the NSW Land Council emerged the state was faced, for the first time, with alternative definitions of Aboriginality, notwithstanding the influence of interaction.[72]

*Domesticating Resistance* is a study of encroaching community and state power, and the resistance of the Dhan-gadi to envelopment through dispossession, protection and assimilation. Morris describes a particular Aboriginal culture, but also places that culture's experience in the wider context of the imposition of colonial, State and federal policy and practice, and the establishment of a permanent non-Aboriginal community. Moreover, he does so without suggesting a loss of authenticity of Dhan-gadi society while detailing the considerable, even devastating, changes that have occurred.[73]

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[70] Morris, pp.2-3.
[71] *ibid.* pp.3-4.
[72] *ibid.* Chapters 8 and 9.
[73] *ibid.* chapter 7.

Although Morris makes generalisations - for example that the movement from politics of exclusion towards inclusion (assimilation) was State-directed and therefore common across Aboriginal communities - his particular focus on the Dhan-gadi and the Macleay Valley area establishes that processes of assimilation were telling in a local as well as wider contexts.[74] For example, post-World War Two assimilation in the Macleay district was pursued in the context of achieving racial 'equality', therefore challenging existing social practices of the dominant community.[75] From 1940 in New South Wales,

> Institutional control by the state was intended to be seen, not as a negative expression of repressive power that depersonalises and humiliates individuals, but as a positive pedagogic force that seeks not only to confine Aborigines, but also to remodel them as individuals, which is very much an act of power.[76]

Patricia Waugh states that Foucault focuses on 'the other' in his work in order to demonstrate how "so-called transcendent theories arise out of institutional discourses" constructed through processes of interactive exclusion.[77] The importance of Morris' work is that he is able not only to explore how the Dhan-gadi's relationship with dominant society developed, but also to use this basis to critique policies, practices and assumptions of assimilation which developed in the 1950s and 1960s.[78]

In Foucauldian terms, Morris relates representations of Aboriginality to constructions of history:

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[74] Though this period is (mostly) before 1967, Morris states the referendum should be seen in the context of the assimilationist era in which it was held, as well as in relation to the new rights it enshrined.
[75] Morris, pp.158-163.
[76] *ibid.* p.129. Morris notes, "I should stress that the word 'positive' is not used in a moral or ethical sense here but as an act of power."
[77] Patricia Waugh (ed.) *Postmodernism: a reader* E.Arnold, London and New York, 1992, p.6.
[78] Morris, Chapter 7.

> The appropriation of Aborigines as cultural/historical figures mystifies the relationship that exists between this new ideological representation of Aborigines and their constitutional/legal status. It provides the basis for the ideological struggle between the Aboriginal understanding of the past and the production of the past by the state.[79]

The practical ramifications are in evidence in the importance of the construction of Aboriginality - for example, in *Milirrpum* (as Morris somewhat clumsily intimates) Blackburn's ruling that native title could not exist in common law, in affirming legal precedent, also provided legal affirmation of the construction of Aboriginal communities as on the fringe of Australian society rather than as distinct indigenous peoples with rights stemming from that fact.[80] What *Milirrpum* affirmed was the concept of Aboriginal society as 'traditional' (as in unaltered pre-contact) or 'assimilated', confirming that the rights theoretically available to the Yolngu were specifically and narrowly European. As chapter one discusses, what it legally affirmed was that the existing relationships to land of indigenous peoples ceased with the onset of British sovereignty.

An approach such as Morris' remains persuasive when the knowledge it produces is used to underline constructions of Australian identity as well as Aboriginality, but it remains unclear whether it offers mechanisms for reconstituting those constructions to accommodate indigenous ways of thinking. Marcia Langton argues that only a few anthropologists have studied alcohol problems in Aboriginal communities, perhaps because some "might not want to consider the role of the Western imagination, and their own imaginings, in some of *their* notions about contemporary Aboriginal society as dysfunctional."[81] As Steven

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[79] *ibid.* p.203.
[80] *ibid.* p.202.
[81] Marcia Langton, "Rum, seduction and death: `Aboriginality' and alcohol" *Oceania* Vol.63, No.3, March 1993, p205.

Webster suggests, 'postmodernism' can appear unaware of assumptions within the theory, in that "the other" is invoked to

> dramatise what, *ex hypothesi*, is seen as unanalysable: the hegemonic sway of their own culture over all Western reason.[82]

Cowlishaw argues that there appears to be an assumption in much contemporary writing in Aboriginal studies that the correct theoretical framework somehow can create a correct political line.[83] I argue this is the case in both legal and historical works that argue for the recognition of native title based on a better appreciation both of Aboriginality and of histories of indigenous resistance since first colonisation. However, it is also present (as Cowlishaw demonstrates) in some 'post-modern' discourses. The 'classical' anthropological task is to understand the 'other'. The Saidean-based approach is similar, and seems to mistake the conceiving of the nature of previous errors with the proposition that the 'Aborigine' described in post-modern terms is closer to authentic. In particular, a one-dimensional view of 'the Aborigine' as the damaged 'Other' is not able to deal with the ongoing reality of indigenous cultural practice continuing, or of indigenous people whose 'traditional' land and culture appears to have been lost making claims based on their Aboriginality.[84]

However, I argue that to comprehend - or to claim to comprehend - indigenous relationships to land allows for an abrogation of the political complexity involved, and therefore may risk impinging of rights that theoretically are acknowledged. This argument is part expediency: it is unlikely that a majority of Australians will

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[82] Steven Webster "Postmodern Theory and the Sublimation of Maori Culture" *Oceania* Vol.63, No.3, March 1993, p.235.
[83] Gillian Cowlishaw "Introduction: Representing Racial Issues" *Oceania* Vol.63, No.3, March 1993, p.188.
[84] Frow and Morris, p.xxi.

engage with anthropological discourse in order for indigenous relationships to land to be facilitated. It remains uncertain if Australian institutions and society are prepared *not to understand* but to still acknowledge indigenous relationships to land. I do not propose a promotion of public ignorance. Rather, I suggest that an intimate comprehension of indigenous culture should not be a prerequisite for the recognition of indigenous relationships to land.

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Assumptions associated with the progression from a lower to higher culture have been critically scrutinised and newly uprooted by Australian law and politics, and made illegal by the *Racial Discrimination Act 1975*, a shift which in part enabled the High Court to legally recognise native title in *Mabo*. However, these assumptions have not been completely overturned. To do so involves, in part, increased attention to descriptions of Aboriginal societies. Equally it requires an awareness of imperatives of non-indigenous society which are bolstered, confirmed, enforced or encoded by the simplification of Aborigines as 'traditional' or 'assimilated'. This does not exist in the historical abstract - it has influenced and in some cases become embedded in popular consciousness, and in policies and legislation aimed at indigenous peoples.

What follows is that 'traditional' Aboriginal culture is placed in the irretrievable past of "pre-history", where its authenticity is unfettered. However, if the effects of colonisation and assimilation (land and identity) are deemed to have been strong, 'tradition' has been lost, and with it the 'authenticity' of being Aboriginal. To what extent is native title able to reflect accurately ongoing traditional

attachment? Is the tradition in native title reflected in a purely legal sense? Or does it broaden to include ongoing indigenous identity, and perhaps attempting to incorporate Aboriginal law as well as aspects of self-determination? If so, to what extent, and with what implications for non-indigenous as well as indigenous modes of thought?

Such questions indicate a divide between law and policy on one hand, and theoretical observation and epistemology on the other. Definitions of Aboriginality mirror the purposes of the definers, frequently reflecting the tension between recognition of indigenous difference, and visions of a nation-state based on 'equality'. Indigenous peoples have fought to maintain their cultures, even in altered forms, in defiance of dominating colonial, State and national presences. Non-Aborigines also make and remake 'the Aborigine' and concepts of Aboriginality - as they want to, and often in stereotypes. When demonstration of ongoing culture becomes a basis for the recognition of political rights (and credibility, it would seem to some) for indigenous peoples, it becomes necessary to question limited definitions of 'traditional' which overlook processes of change. I argue that language authenticates assumptions, and assumptions appropriate language - such processes are circular, without definable beginning or end points. It is therefore important to avoid reproducing meanings which implicitly create new 'assumed Aborigines'.

# Chapter Five

## Damage to the minimum extent necessary

### indigenous heritage - land rights without title

In August 1993, indigenous leaders meeting at Eva Valley station to co-ordinate their representations to the federal government over *Mabo* issued a statement of demands which included

> Total security for Sacred Sites and Heritage Areas which provide for Aboriginal and Torres Strait Islander Peoples' absolute authority.[1]

On 3 May 1994 the South Australian Ministers for Aboriginal Affairs, Michael Armitage, announced in Parliament that a bridge linking Goolwa to Hindmarsh Island[2] would proceed, as he had "reluctantly issued an authorisation to the Department of Road Transport to allow damage to Aboriginal sites to the minimum extent necessary to allow the construction of a bridge".[3] Armitage stated that it was clearly not practicable both for the bridge to be constructed and for Ngarrindjeri sites to be protected. He concluded that

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[1] *Eva Valley Statement* 5 August 1993, reprinted in Murray Goot and Tim Rowse (eds.) *Make A Better Offer - the politics of Mabo* Pluto Press, Leichhardt, 1994, p.234. See also *Aboriginal Peace Plan* 27 April 1993 reprinted in Goot and Rowse, p.218; Council for Aboriginal *Reconciliation Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* (primary author Marcia Langton) AGPS, Canberra, 1994, pp.30-32.

[2] Whether to refer to Hindmarsh Island or Kumarangk is a relevant issue given this thesis' themes. I use each term depending on context, but noting especially that it is a Hindmarsh Island rather than a Kumarangk bridge.

[3] South Australia House of Assembly: Parliamentary Debates (Hansard) Government Printer, South Australia, 3 May 1994, p.949. See also Professor Cheryl Saunders *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh (Kumarangk) Island* Pursuant to Section 10 (4) of the Aboriginal and Torres Strait Islander Act 1984, Centre for Comparative Constitutional Studies, University of Melbourne, Melbourne, 1994 (*Saunders Report*) p.29.

> I believe that the Government and the Aboriginal community share two common goals: a commitment to economic development, and a respect for Aboriginal culture and history. The challenge for us all is how to promote one without foregoing the other.[4]

The subsequent ban halting construction of the Hindmarsh Island bridge, made under the federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* acknowledged Ngarrindjeri women's spiritual relationship to Kumarangk.

This chapter argues that indigenous heritage legislation, while not conveying freehold or native title, is a type of land right stemming from indigenous relationships to land. I identify and contrast three distinct kinds of land rights.[5] The first is the granting of freehold title, which as Bradshaw states

> carries with it the inference that the legislation confers on those Aboriginal people for whose benefit title to land is granted a significant measure of control over the management of the land, the use to which it may be put, and access by third parties, eg for mineral exploration.[6]

This kind of land right includes both the transference of title of land previously set aside as Aboriginal reserves, and regimes for land claims to be made based on ongoing cultural attachment.

The second kind of land right is the common law recognition of ongoing native title, which following *Mabo* are those rights or interests to land or waters that the common law is able to recognise as reflecting an ownership of land.[7] Further

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[4] *ibid.* pp.949-50.
[5] These three kinds of land rights are each compatible with the braoder definition of land rights discussed in the introduction of this thesis.
[6] Richard Bradshaw "The relationship of native title and native title legislation to land rights legislation" Richard H. Bartlett and Gary D Meyers (eds.) *Native Title Legislation in Australia* Centre for Commercial and Resources Law, University of Western Australia, Nedlands, 1994, p.159.
[7] Commonwealth *Native Title Act 1993* s.223.(1).

debate is necessary on the relationship between these two kinds of rights. There is now also the Indigenous Land Corporation, set up for the purpose of funding land acquisition and management where native title cannot be proved.[8]

However, here I emphasise a third kind of land right, indigenous heritage protection. This implies no ownership, and is not present in the definition of "Aboriginal/Torres Strait Islander land or waters" under the *Native Title Act 1993*, but nevertheless provides indigenous people with rights based on ongoing relationships to land to protect sites or areas from continuing appropriation settlement.

Although the existing mix of land rights legislation was not planned as an holistic regime, in implementation there are layers of augmentary rights. In the Northern Territory this includes the federal *Aboriginal Land Rights (Northern Territory) Act 1976* and the N.T. *Sacred Sites Act 1989*. In South Australia it includes the State *Aboriginal Lands Trust Act 1965*[9], the Pitjantjatjara and Maralinga land rights Acts, and the *Aboriginal Heritage Act 1984*. Both South Australia and the Northern Territory are covered by the federal *Aboriginal and Torres Strait Heritage Protection Act 1984* and the *Native Title Act 1993*.

Indigenous heritage protection becomes important in post-*Mabo* 'settled' Australia where indigenous relationships to land persist even if native title has been extinguished. Of the legislative mechanisms now in place, heritage rights seem

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[8] *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth).

[9] Bradshaw, p.160 places the *Aboriginal Lands Trust Act 1966* (SA) in his list of land rights legislation, while noting this is "debatable". As he notes, the vast north-west reserve was notably ommitted from those reserve lands which became Aboriginal land, but the *Native Title Act 1993* (Cth) s.253 includes the Act in its list of "Aboriginal/Torres Strait Islander land or waters".

closer to a recognition of rights continuing in 'settled' Australia where the land is not 'empty' or 'remote'. While it is true that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* "has rarely been used to prevent the destruction of an Aboriginal site", I argue that the Act will now be employed more frequently.[10] Indeed, in post-*Mabo* circumstances it has become a more imaginative piece of legislation than was initially intended. Indigenous heritage protection is able to penetrate throughout Australia, rather than being bound by imposed delineations of 'Aboriginal land'.[11]

The persistence of indigenous relationships to land is not determined by whether that attachment is conveyable by Australian law and society. However, acknowledgment of land rights is impacted on by the extent to which other rights impede on that translation of indigenous relationships to land. If indigenous relationships to land persist, then the rights that stem from this will require co-existence with competing rights and interests. This is the case in 'outback' Australia, where pastoralism and then mining impacted, but the co-existence required in 'settled' Australia is both different and more acute. I argue that the idea of the 'traditional Aborigine' as in pre-contact, as 'authentic', can be seen here through a comparison of the Pitjantjatjara land rights and Ngarrindjeri relationships to Kumarangk. This continues the discussion in chapter four that linked interpretations of Aboriginal culture with reflections on what constitutes ongoing traditional attachment to land.

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[10] Maureen Tehan "Practising land rights: the Pitjantjatjara in the Northern Territory, South Australia and Western Australia" in Murray Goot and Tim Rowse (eds.) *Make a better offer - the politics of Mabo* Pluto Press, Leichhardt, 1994, p.44.
[11] Diane Bell [**in full**] p.279.

As indigenous relationships to land are broad and reflect different values and beliefs to different Aboriginal groups, land rights stemming from these relationships must also be broad, recognising not only the capacity of indigenous relationships to alter but also how those relationships interact with other rights. While heightening the emphasis on indigenous heritage legislation might seem a submission to imposed limits, the ability of Australian conceptions of land to acknowledge indigenous rights over land where ownership will not follow is a challenging issue. Moreover, it is representative of the problem that I have emphasised, between flexibility/ambiguity against the perceived need for certainty over land and the associated 'complete' knowledge of all inhabitants. In the final part of this chapter, I expand this into a discussion of the "process" and language of reconciliation.

Chapter four showed that 'tradition' is a value-laden expression. 'Traditional' sometimes refers to the pre-contact Aborigine, therefore imposing a static characterisation, but I argue that contemporary Australia is responding now to concepts of Aboriginality that are modern *and* connected to the indigenous past. This in turn has implications for how we consider land rights. Therefore, I employ the term 'sanctionable tradition' to describe efforts of the state, through legislative or other institutional mechanisms, to recognise in a practical sense indigenous relationships to land.

**sanctionable tradition in settled and remote Australia**

Discussion of sanctionable tradition in the case of the Hindmarsh Island bridge illustrates a fundamental issue for this thesis: how are Australian political and

social institutions to react to a legal formulation of indigenous rights to land based on a principle of ongoing cultural or traditional attachment? While an imposed fixture such as a bridge provides physical, visual certainty, structural presence does not equate to conceptual finality. Indeed, I argue that the replacement of 'certainty' with flexibility (even if that certainty is perceived or created) in turn creates new challenges for liberal-democracy, particularly relating to areas of land where it might be thought that indigenous relationships to land had been broken.

On 10 July 1994, the federal Minister for Aboriginal Affairs, Robert Tickner, banned for twenty-five years the construction of a bridge linking the South Australian mainland at Goolwa to Hindmarsh Island (Kumarangk). The catalyst for building a bridge was the proposal by Tom and Wendy Chapman's company, Binalong Pty Ltd (Binalong), to build a marina and engage in other developments on Hindmarsh Island. Binalong first purchased land in 1977; in October 1989 the South Australian State Labor government approved a bridge in principle, subject to a satisfactory Environmental Impact Statement.[12]

In December 1993, Labor lost the State election. By this time, financial concerns had been raised, and both the Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement had raised Ngarrindjeri heritage concerns. However a review by the new Liberal State government concluded in March 1994 that the bridge would proceed, and that therefore the State *Aboriginal Heritage Act 1984* could offer no protection.

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[12] Environmental issues are another example of differing interpretations over land and land use. A different piece of research might assess the relationship between environmental issues and indigenous land rights with regard to the Hindmarsh Island debate. The status of National Parks post-*Mabo* is not settled: see Hal Wootten "The Mabo Decision and National Parks" in Susan Woenne-Green and others *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia: A Review* Australian Conservation Foundation [1994] p.324.

This was the catalyst for federal government intervention. Tickner was satisfied that under the terms of the federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* the area was "a significant Aboriginal area" and was "under threat of injury and desecration".[13] This conclusion was based on a report prepared under the terms of the Act by constitutional lawyer Professor Cheryl Saunders (*Saunders Report*) who found that

> Representations to me, authorised by a large representative group of Ngarrindjeri women, speak of the spiritual and cultural significance of Hindmarsh and Mundoo Islands, the waters of the Goolwa channel, Lake Alexandrina and the Murray Mouth within the sacred traditions of Ngarrindjeri women, crucial for the reproduction of the Ngarrindjeri people.[14]

Included as an appendix in the Saunders Report was a report prepared for the Aboriginal Legal Rights Movement by anthropologist Deane Fergie (*Fergie Report*) which detailed Ngarrindjeri women's relationships with Kumarangk, and included two confidential appendices not to be read by men.[15] An appeal by the Chapmans was upheld on 15 February 1995 by Justice O'Loughlin of the Federal Court, therefore authorising construction of the bridge.[16] Tickner filed an appeal to the full bench of the Federal Court which at the point of writing awaits ruling.[17]

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[13] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) with amendments; Commonwealth of Australia "Aboriginal and Torres Strait Islander Heritage Protection Act 1984 - Declaration Under Section 10 - Kumarangk (Hindmarsh Island)" *Gazette* (Special) No.S 270, AGPS, Canberra, 10 July 1994, p.1.

[14] *Saunders Report* p.5.

[15] Deane Fergie *To all the mothers that were, to all the mothers that are, to all the mothers that will be. An anthropological assessment of the threat of injury and desecration to Aboriginal tradition by the proposed Hindmarsh Island Bridge Construction* A Report to the Aboriginal Legal Rights Movement Inc in relation to Section 10(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 4 July 1994.

[16] O'Loughlin J No.SG57 of 1994 in the Federal Court of Australia.

[17] This summary is necessary to facilitate the discussion which follows. I acknowledge that there are many other important events, incidents and details which are relevant to the manchinations of the bridge debate.

Debate over the Hindmarsh Island bridge is ongoing. A discussion here of Tickner's ruling and O'Loughlin's judgment leads to a focus on underlying complexities which I argue are not being adequately considered in this institutional imbroglio. There have also been political/media 'scandals', notably Ian McLaughlin's resignation from Shadow Cabinet and suggestions of fabrication against those Ngarrindjeri women proposing the "women's business" (resulting in a South Australian Royal Commission) but these are not a part of this chapter. Rather, I focus on the institutional recognition of indigenous tradition and change: it is not intended as a detailed history of the Hindmarsh Island bridge saga and the chapter's rationale does not alter depending on whether a bridge ultimately connects Goolwa to Hindmarsh Island or on what the Royal Commission concludes.

For Lower Murray Aborigines, European encroachment preceded the foundation of the colony of South Australia in 1834. Sealers based on Kangaroo Island who brought Aboriginal women from Tasmania also kidnapped Ngarrindjeri women and introduced sexually transmitted diseases. Two smallpox epidemics appear to have travelled down the river, between 1814-1820 and 1829-1831.[18] Even before the area began to be physically settled, and certainly well before the missionary George Taplin founded Point McLeay (Raukkan) in 1859, the Lower Murray had been altered physically and conceptually. Indeed, those changes to and about the land are interlinked, given that South Australia was theorised over prior to colonisation and that settlers brought a variation of Wakefieldian theory to the

[18] Ronald M. Berndt and Catherine H. Berndt *A World That Was - The Yaraldi of the Murray River and the Lakes, South Australia* with John E. Stanton, Melbourne University Press at the Miegunyah Press, Carlton, 1993, p.292.

colony. This makes South Australia a stark but not unrepresentative example of new values being imposed in tandem with the physical appropriation of land.

In calling his history of contact in the Lower Murray *Conquest of the Ngarrindjeri*, Graham Jenkin describes the heroic dispossession of the quintessential 'Aussie battler':

> In many ways, the modern history of the Ngarrindjeri (i.e. since 1820) has been one of those glorious defeats with which Australian history in general seems to be studded: of people trying to do the impossible and, miraculously, very nearly succeeding. It is redolent of Eureka, Glenrowan and Gallipoli. The nation, which probably numbered only slightly in excess of 3000 people at the time of the invasion, was bound to be destroyed: it was, after all, opposed by the British Empire at the height of its power. Yet, in going down, it recorded so many remarkable achievements that the modern history of the Ngarrindjeri is not entirely a tragic one, and it is certainly a history of which the present day descendants of the Ngarrindjeri can be proud.[19]

George Taplin stated "We may either consider the 'Narrinyeri' as a nation divided into tribes, or as a tribe of Aborigines divided into clans".[20] Similarly, Jenkin refers to the "the confederated nation of the Ngarrindjeri"[21], but Ronald and Catherine Berndt note that 'Narrinyeri' originally meant 'belonging to people' as opposed to 'Kringgari', a term for white settlers. However, the Berndts recognise that literature uses and the modern descendants of the indigenous Lower Murray peoples identify with 'Ngarrindjeri'.[22]

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[19] Graham Jenkin *Conquest of the Ngarrindjeri - the story of the Lower Murray Lakes tribes* Rigby, Adelaide, 1979, p.11.
[20] Rev. George Taplin *The Narrinyeri* J.T. Shawyer, Adelaide, 1874, p.1.
[21] Jenkin, p.11.
[22] Berndt and Berndt, p.19.

By taking this further Phillip Clarke makes important connections between land and identity. As the landscape was "altered" to accommodate agriculture "Aboriginal people were largely removed to missions and pastoral properties and government stations", with Aborigines from a wide area centralising around the Point McLeay mission.[23] With this mix of Aboriginal identities in mind, Clarke suggests that

> the personal life histories of most southern Aboriginal people became related through the manner of their incorporation into the State. Attwood claims that being an Aboriginal person is 'a consciousness shaped by both the colonisers and colonised, and in this sense the experience of being Aboriginal is both determined and determining'. (1989, p.150) I argue that the Australian pan-Aboriginal identity has only really existed in the context of 'White' and 'Black' relations.[24]

'Ngarrindjeri' has a modern political as well as cultural application. This suggests that difficult questions remain about the nature of ongoing and evolving indigenous rights in areas of 'settled' Australia. Indigenous relationships to land may persist, but there are also competing demands on Lower Murray land and water. In contrast, the Pitjantjatjara, whose lands have been subject to a far less accosting form of appropriation settlement, have had ownership over part of their lands confirmed by the South Australian government.[25]

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[23] Phillip A. Clarke *Contact, Conflict and Regeneration: Aboriginal cultural geography of the Lower Murray, South Australia* unpub..PhD thesis, University of Adelaide, 1994, p.82. Clarke suggests Aborigines from northern South Australia, the West Coast, Adelaide, the Upper Murray, the Lower South East and possibly Tasmania came to the Lower Murray.

[24] *ibid*; the Attwood reference is from *Making of the Aborigines* Allen & Unwin, Sydney, 1989, p.150.

[25] Contrast Arthur J. Perkins *South Australia - an agricultural and pastoral State in the making, first decade, 1836-1846* Government Printer, Adelaide, 1939, pp.172-173, on the speed of land allocation in the Lower Murray after initial settlement with Phillip Toyne and Daniel Vachon *Growing up the country: the Pitjantjatjara struggle for their land* Penguin and McPhee Gribble, Fitzroy and Ringwood, 1984, p.13, on the "limited commercial potential" of Pitjantjatjaran lands.

As Edwards suggests, appropriation settlement had not encroached sufficiently to break the Pitjantjatjara belief that they without dispute owned their own land.[26] Nevertheless, following protracted debate and disagreement, and the disruption of a change of government, the *Pitjantjatjara Land Rights Act 1981* was unanimously passed by a South Australian Liberal parliament.[27] The principle of valid, sanctionable tradition was incorporated into South Australian law through the Pitjantjatjara struggle for recognition of their ongoing relationships to land. Even allowing for the often heated resistance to Pitjantjatjara claims, in retrospect the rights conveyed confirmed popular preconceptions of the 'traditional Aborigine'. Referring to the Pitjantjatjara and Maralinga Acts, Jane M. Jacobs argues that

> The legislation dealing with land rights in South Australia reflects both covertly and overtly the popular attitude that the only 'true' Aborigines are those who are overtly traditional . . .. Many of the state's Aboriginal population have been displaced from their traditional lands, live in towns, participate in the mainstream economy and, in short, do not display any of the characteristics which white Australia accepts as hallmarks of a tradition-oriented lifestyle. This is not to say that these groups do not have a strong sense of Aboriginality based on culturally unique constructs; simply that they are not seen by outsiders as culturally pristine. Nor is it correct to assume that these Aborigines do not have an interest in land, whether cultural, social or economic.[28]

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[26] Bill Edwards "Pitjantjatjara Land Rights" in Nicolas Peterson and Marcia Langton (eds.) *Aborigines, Land and Land Rights* Australian Institute of Aboriginal Studies, Canberra, 1983, p.296, 303.

[27] As with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth), the *Pitjantjatjara Land Rights Act 1981* (SA) was passed by a Liberal government, although initial Bills were presented by subsequently defeated Labor governments.

[28] Jane M. Jacobs "The construction of identity" in Beckett (ed.) *Past and Present - the Construction of Aboriginality* Aboriginal Studies Press, Canberra, 1988, p.32. See also David Hollinsworth "Discourses on Aboriginality and the politics of identity in urban Australia" *Oceania* Vol.63, No.2, December 1992, p.152 (fn.7).

Here we see the delineation between pre-contact ('primitive') and 'settled' ('civilised'), where legislation authenticates perceived primitiveness within land rights debate.

According to the *Pitjantjatjara Land Rights Act 1981*,

> "traditional owner" in relation to the lands means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.[29]

The framers of the legislation attempted to address Pitjantjatjara rather than western concepts of land ownership. Don Dunstan, then Labor Premier of South Australia, argued in debate over the initial Bill that

> The Pitjantjatjara say that the whole of Pitjantjatjara land belongs to all Pitjantjatjaras. Given the acceptance of this notion by the Government, it would not have been sufficient simply to issue title under the Real Property Act as this would have left unresolved questions as to who was a Pitjantjatjara, and what, if any, special rights and responsibilities needed to be spelt out in order to render ownership as close as possible to the Pitjantjatjara notion and at the same time to take into account the context of a modern, western State.[30]

Early in the debate over possible legislation, a parliamentary Working Party report argued that

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[29] *Pitjantjatjara Land Rights Act, 1981* (SA) s.4. This definition has a specific Pitjantjatjara relationship, "Pitjantjatjara" under the Act referring to a person who is a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people, and who is "a traditional owner of the lands, or a part of them". This section is not a history of this process or a description of the functioning of the Arunga Pitjantjatjara corporation. The definition of "traditional owner" is the same in the *Maralinga Tjaratju Land Rights Act, 1984* Government Printer, Adelaide, No.3 of 1984, s.3.

[30] South Australia *House of Assembly, Parliamentary Debates (Hansard)* Government Printer, South Australia, 22 November 1978, pp.2235-2236.

> The critical question to be decided was how the concept of communal ownership could be expressed. An answer had be to adduced which would be understood by the Pitjantjatjara and at the same time be capable of recognition in law.[31]

As the *Aboriginal Land Rights (Northern Territory) Act 1976* covered Pitjantjatjara land, it generated interest among Pitjantjatjara as to their rights over their South Australian lands.[32] Jacobs states that the Pitjantjatjara and Maralinga Acts were "loosely modelled" on the Northern Territory legislation, which in turn stemmed from the Second Report of the Woodward Royal Commission, initiated by the Whitlam Labor government.[33] Woodward, who had acted for the Yolngu in *Milirrpum*, was asked to consider legislative

> means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land.[34]

Woodward states that he advised against an appeal in *Milirrpum* because the High Court, as then constituted, might have been even more dismissive than Blackburn. Instead, "I took the view that the finding of close identification between particular groups or people and particular land was sufficient to mount a claim for recognition of Aboriginal title at a political level".[35]

The *Aboriginal Land Rights (Northern Territory) Act 1976* defines "Aboriginal tradition" as

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[31] South Australia *Report of the Pitjantjatjara Land Rights Working Party* June 1978, p.63.
[32] Toyne and Vachon, p.37.
[33] Jacobs, p.32.
[34] A.E. Woodward *Aboriginal Land Rights Commission: Second Report* Govt Printer, Canberra, April 1974, Appendix E (Terms of reference) p.183.
[35] A.E. Woodward *Three Wigs and Five Hats* The Fourth Eric Johnston Lecture, Occasional Papers No.17, NT Library Service, Darwin, 1990, p.6.

> the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.[36]

Stemming from this, the definition of "traditional Aboriginal owners" is a group of people with "common spiritual affiliation" and with the right to forage over a certain area of land.[37] Keen argues that this definition derives from the "orthodox model" of patrilineal Aboriginal land tenure;

> The relationship between a land-holding unit and its land is primarily spiritual: the group is affiliated to creators, sites bearing traces of their activities, and related sacred objects, designs, stories and songs.[38]

The Pitjanjatjara Working Party report argued that the Pitjantjatjaras claims to land could be sustained, "since we are convinced that many Pitjantjatjaras still have an alternative, adult, and fully-fledged culture which needs land to uphold it".[39] In that context, a bestowed validity exists because the degree of disruption to 'traditional' (as in 'tribal') relationships to land, and the corresponding degree of appropriation settlement is deemed to be relatively minor. Even allowing for the vociferous opposition to their land rights which the Pitjantjatjara absorbed, I argue that depictions of the 'traditional Aborigine' were not challenged by the legislation which eventually was passed, even if it shocked some to realise that the 'traditional Aborigine' might possess such rights.

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[36] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) with amendments, s.3 (1).
[37] *ibid.*
[38] Ian Keen "A question of interpretation: the definition of 'traditional Aboriginal owners' in the Aboriginal Land Rights (N.T.) Act 1976" in L.R. Hiatt (ed.) *Aboriginal Landowners - Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* Oceania Monograph No.27, University of Sydney, 1984, p.25. This anthropological debate is outside of this thesis' purview but see Marc Gumbert *Neither Justice nor Reason - A Legal and Anthropological Analysis of Aboriginal Land Rights* University of Queensland Press, St Lucia, 1984, see chapters three and four.
[39] *Pitjantjatjara Working Party*, p.21.

In part this might reflect the geographical distance of the Pitjantjatjara's land from 'settled' South Australia, as well as the desert environment. Although there was opposition to the granting of rights, no challenge to popular representations of Aboriginal culture was necessary. Connected to this is the respective types of land in question, and the extent to which 'appropriation settlement' penetrated:

> Beyond the settled areas, the situation was somewhat different. Even as late as the Royal Commission of 1913-15, Aborigines in the western half of the State had been largely overlooked. Fortunately for them, their land was not thought suitable for either agricultural settlement or pastoral use, and they were therefore left in relative peace to follow their traditional patterns of land use. Here it was eventually possible - in the 1980s - to give Aborigines land title in compensation for land alienation.[40]

However, it is apparent that the 'open' space and 'isolation' which allowed less disruption to Pitjantjatjara culture and relationships to land during the nineteenth century and into the twentieth century were the same geographic/climactic conditions that subsequently made mineral exploration a possibility. Toyne and Vachon state that due mainly to mining and mineral exploration

> Gradually, the land was being transformed into a place where settlements and missions and pastoral stations were located, where one worked and learnt from Europeans, where rations and social security cheques were received and where the problems of settlement life were debated and suffered.[41]

While some disruption had previously occurred due mainly to pastoralism, it was not until mining intensified from the 1950s that appropriation settlement became particularly disruptive.

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[40] Trevor Griffin and Murray McCaskill *Atlas of South Australia* South Australian Government Printing Division, Adelaide, 1986, p.30.

[41] Toyne and Vachon p.34. Edwards, p.296 discusses the importance of Ernabella mission as a 'buffer' for the Pitjantjatjara.

In his Federal Court judgment, O'Loughlin suggests an explicit conceptual difference between the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* as against the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Native Title Act 1993*, in that heritage legislation "is not directed to concepts of use, occupation or ownership". He notes that preservation or protection is required over land or water of particular significance to Aboriginal peoples but "There is no connecting link between the area and the Aboriginals or between the area and Aboriginal tradition that relies on use, occupation or ownership."[42]

O'Loughlin makes this point to reject an argument that there was disagreement over which Aboriginal persons were entitled to claim that the area was a significant Aboriginal area.[43] This highlights the distinctive nature of indigenous heritage rights, but I argue that is also wrongly implies that heritage is not based on rights stemming from indigenous relationships to land. More generally, it is open to interpretation how broadly the terms "use, occupation and ownership" can or should be applied. While it is true that title to land is not *conferred* by heritage mechanisms, rights based on indigenous relationships to land are conveyed. Indeed, the potential is for this to be even more complicated given the (re)emergence of an indigenous land right over an existing, confirmed title. In particular, the federal Act aims for

> the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that

[42] O'Loughlin at 90-91.
[43] *ibid.*

> are of particular significance to Aboriginals in accordance with Aboriginal tradition.[44]

In this context, "Aboriginal tradition" is

> the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationship[45]

Therefore, Aboriginal people may assert their evolved, living traditions as well as, or in combination with, reconstituting what is remembered of the past. Concepts of changelessness are not required, although this depends on interpretation, and is perhaps implicit when the onus is to *prove* tradition.[46] O'Loughlin may have in mind a concept of a national heritage, referring to structures or areas of land with such historical and cultural value that the whole community is deserving of inheritance[47], but it is inconceivable that ongoing relationships to land are not fundamental to indigenous heritage protection determinations.

The South Australian *Aboriginal Heritage Act 1988* defines "Aboriginal tradition" as

> traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs *that have evolved or developed from that tradition since European colonisation.*[48]

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[44] *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) s.4.
[45] *ibid.* s.3.
[46] As occurs with native title, despite Toohey's suggestion to the contrary; *Mabo* (Toohey) at 142. See French *Waanyi Determination* at 22: "on the question of extinguishment it is necessary that the applicants show that on the known land tenure history they can make out a prima facie case that native title has not been extinguished."
[47] *Australian Heritage Commission Act 1975* (Cth) with amendments, s.4 (1).
[48] *Aboriginal Heritage Act 1988* (SA) including amendments, s.1 (3) my emphasis. This Act replaced *the Aboriginal and Historical Relics Preservation Act, 1965* (SA) which contained a definition of "relic" placing protection overtly in the disconnected past, see s.3 (1)(a)-(b).

This definition more explicitly acknowledges notions of dynamic rather than static tradition - according to the Act, "to damage" includes "to desecrate, deface or destroy", inferring fixedness stemming from "preservation", but nevertheless placing no obligation on indigenous relationships to land to be stagnant.[49] Potentially, this suggests a broad interpretation of indigenous tradition (indeed potentially broader than the federal Act), acknowledging tradition in defiance of, in response to, in reaction against, and in accommodation with non-indigenous encroachment.[50] The South Australian definition may imply this, but there are limitations in its implementation. As with the federal Act, flexibility allows for arbitrary and possibly contradictory responses.

Fergie notes that Tickner used the federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* as a "safety net Act", but less clear is her suggestion that the Act "is designed not to take the place of State legislation, but rather to provide protection where State measures fail".[51] According to then federal Labor Minister for Aboriginal Affairs, Clyde Holding, at inauguration the Act was an "interim measure" for no more than two years, pending the development of national land rights legislation - indeed, it first existed as the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984*.

In June 1987, the "interim" aspect was dropped, coming after the proposed national land rights legislation was shelved by the Labor government. The federal Coalition (while perhaps along party/partisan lines) questioned the credibility of

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[49] The Act is "An Act to provide for the protection and preservation of the Aboriginal heritage."*Aboriginal Heritage Act1988* (S.A.) s.3.
[50] *Saunders Report* p.29.
[51] Deane Fergie "Whose sacred sites? Privilege in the Hindmarsh Island Bridge Debate" *Current Affairs Bulletin* August/September 1995, p.19.

the Act given these origins. Indeed, the federal Labor government appears to consider indigenous heritage legislation to be in need of review given this (admittedly nebulous) statement stemming from deliberations on the implications of *Mabo*:

> It is desirable to make further progress on more effective heritage protection legislation across Australia as expeditiously as possible. The strongly expressed wish of Aboriginal and Torres Strait Islander people to have absolute protection accorded to sacred sites and other areas of cultural significance needs to be addressed as a priority. In addition, a legislative scheme which sets out active measures for site and heritage protection is an essential element in diminishing the number of disputes between native title holders and those with an interest in resource development. This would be achieved by taking the matter of such protection outside forums in which decisions are made in relation to competing land uses, to the maximum extent practicable.[52]

I argue it is not only "the forums" but also the "competing land uses" which are problematic, a point heightened if extinguishment of native title is confirmed. The principle of extinguishment under the native title regime alters the importance of heritage legislation as a means of facilitating land rights, particularly in 'settled' Australia where alternative titles placed over the land are confirmed. However, extinguishment of native title is different to loss of indigenous relationships to land, and equating the two is to confuse public policy with Aboriginality. The difficulty in reconciling these different relationships to land through relationships of identity is, I argue, more intricate in the Lower Murray than in the north west of South Australia.

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[52] Commonwealth of Australia *Mabo - the High Court Decision on Native Title* Discussion Paper, Comomonwealth Government Printer, Canberra, June 1993, pp.90-91.

Although noting the particular complications of the Hindmarsh Island bridge case, Saunders indicated that tension stemming from the determination of what constitutes sanctionable tradition has been a feature of section 10 reports under the federal Act.[53] Hal Wootten interprets the definition of Aboriginal tradition in this Act in an expansive and dynamic way:

> The Act does not specify that any degree of antiquity must attach to the observances, customs and beliefs, which may obviously change over time, although the word "tradition" in its ordinary meaning carries the notion of being handed down from generation to generation.[54]

Wootten suggests it is "unreal" to expect Arrente tradition to persist as it was prior to European encroachment.[55] Nevertheless, his definition is a political interpretation that the federal Act can include "marking, sustaining and nurturing Aboriginal identity which is under continuous challenge".[56]

Similarly, Saunders comments on the "long and difficult task" of genealogically tracing "traditional owners" by saying

> In my view, this is not a task which needs necessarily to be undertaken for the purpose of the present exercise, as long as the very broad definition of Aboriginal tradition under the Act is met.[57]

Saunders continues that, "This tradition is not mythological but spiritual and an actual reflection of traditional practice, handed down from mother to daughter,

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[53] *Saunders Report* pp.33-34.
[54] Hal Wootten *Significant Aboriginal Sites in Area of Proposed Junction Waterhole Dam, Alice Springs* Report to Minister for Aboriginal Affaris under s.10 (4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 Camperdown, p.66. Also cited in *Fergie Report* p.12.
[55] Wooten, p.15.
[56] *ibid.*
[57] *Saunders Report* p.20; but see Partington, p.4, for a response with a limited notion the federal Act in mind.

drawn out of the landscape itself".[58] This differs from O'Loughlin's earlier suggestion of no connection between an area and Aboriginal tradition, relying on "use, occupation or ownership".

Responding to the language of the federal Act, the *Fergie Report* is compelled to consistently affirm Ngarrindjeri relationships to land in terms of tradition: "the most traditional", "the most tribal and traditional", "secret knowledge and traditions", "lived tradition", and so on.[59] Fergie argues that

> This case demonstrates the resilience of tradition in Aboriginal society. It also demonstrates the specificity and persistence of women's tradition in Aboriginal society.[60]

The *Fergie Report* avoids grounding 'traditional' in the past. This recalls Barry Morris' discussion of the development of Dhan-gadi culture, where obvious changes did not equate to loss of culture (see chapter four).

Cowlishaw suggests that active espousals of ongoing traditions in post-contact settled Australia "plays into the reasoning of those who would judge Aboriginal authenticity in positivist terms".[61] However, she continues that

> While the weight of primitivism is a heavy burden to many Aborigines, others deploy the notion of 40,000 years of history as a powerful political

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[58] *Saunders Report* p.31.
[59] *Fergie Report* p.5, 10, 13, 15.
[60] *ibid.* p.12; *Saunders Report* pp,24-25 cites this point by *Fergie Report*.
[61] Gillian Cowlishaw "Studying Aborigines: Changing Canons in Anthropology and History" in Bain Attwood and John Arnold (eds.) *Power, Knowledge and Aborigines* Special edition of *Journal of Australian Studies* La Trobe University Press in Association with the National Centre for Australian Studies, Monash Uni, 1992, p.28.

> weapon. Clearly, traditionalism is a living ideological force which demands a more sophisticated response than disapproval.[62]

At the same time, Hollinsworth suggests that primitivist representations of Aboriginality

> helps to explain how the recent dramatic increase in the celebration of Australia's Aboriginal heritage and in particular, aspects of Aboriginal arts and crafts, can have occurred apparently without significant improvements in either general community relations or the social and material conditions of most Aborigines.[63]

However, if the acknowledgment of indigenous heritage is also taken to exist within a rights-based discourse, Cowlishaw and Hollinsworth can be combined. Two points emerge from this. First, translations of indigenous relationships to land are likely to include widely held pre-conceptions not only of the extent to which tradition is sanctionable but also what 'traditional' entails. Even if this includes, for example, historical references to frontier violence and contemporary awareness of social disadvantage, political power stemming from the paradox of Aboriginality as ancient *and* modern is a challenging one for liberal-democracy. Second, even if it is accepted that land rights stemming from relationships to land are extant, it remains necessary to balance the relative importance of those relationships against other factors. This may be even more complicated, the more 'settled' an area is perceived to be.

The question of proving ongoing relationships to land is an overt consideration in many examples of contemporary anthropological discourse. Where this is not the case, such as in the Berndt's *A World That Was*, texts will be employed by others in

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[62] *ibid.* p.28. See also Vron Ware *Beyond the Pale - White Women, Racism and History*, Verso, London and New York, pp.245-46, on the corporate value of primitivism.
[63] Hollinsworth, p.139.

land rights determinations. Beckett identifies the new complexity created for anthropologists when political factors impinge on research:

> At different times, evolutionary and functionalist anthropologists, as well as those of a political economy tendency, have represented 'primitive culture' as irreparably transformed by contact with 'civilisation'. According to another view, such cultures survive against all odds, encompassing alien influences, yet somehow remaining essentially themselves. But if the first view underestimates the resilience of indigenous cultural reproduction, then second tends to a romantic essentialism which short circuits the understanding of cultural dynamics. This kind of essentialism conceals processes such as cultural revival and the invention of tradition and so converges with those for whom anything less than the pristine primitive is inauthentic.[64]

Beckett identifies the difficulty of avoiding a fixed idea 'the Aborigine'. The point is most obvious when discussing the role of anthropologists in determinations of indigenous relationships to land, but it also applies in history and politics. It is difficult to see how opinions, theories or narratives can avoid considering the language and possibilities of various pieces of legislation.

**where is tradition? - 'sites' and 'areas'**

Although freehold or native title is not available, it is possible to see post-*Mabo* indigenous heritage protection as a more intricate and flexible land right. This is heightened when a spiritual tradition is cited to protect an area of land that

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[64] J. Beckett "The Murray Island case" in W. Sanders (ed.) *Mabo and native title: origins and institutional implications* ANU Research Monograph No.7, centre for Aboriginal Economic Policy Research, Canberra, 1994, pp.21-22. Beckett's point is not invalidated by also accepting Mudrooroo's argument in response to Hollinsworth that many Aboriginal people hold essentialist views which are a valid part of the assertion of their Aboriginality; Mudrooroo Nyoongah "Self-determining our Aboriginality, A Response to 'Discourses on Aboriginality and the politics of identity in urban Australia" *Oceania* Vol.63, No.2, December 1992, p.156.

exceeds what might be classically called a 'sacred site'. However, Woodward's definition of 'sacred site' indicated awareness of more holistic relationships to land:

> Land generally has spiritual significance for Aborigines but, because of the form and content of myths relating to it, some land is more important than other land. Certain places are particularly important, usually because of their mythological significance, but sometimes because of their use as a burial ground or important meeting place for ceremonies . . .. It is not possible merely to protect sacred sites and treat other land as unimportant.[65]

Partington is critical of the Hindmarsh Island bridge ban for its transcendence of a narrow conception of site. He asks whether sites will come under threat from traffic crossing by bridge rather than ferry, and suggests a particular 'sacred' site could be fenced off if under potential threat.[66] This reflects narrow definitions of site and of heritage, whereas the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* responds to differences in Aboriginal conceptions of land and therefore what constitutes protection of land.

When the South Australian Liberal government announced its intention to allow the building of the Hindmarsh Island bridge, Minister for Aboriginal Affairs, Michael Armitage, appeared to concede to damage of an archaeological nature, that is of a known camp site. In contrast, the *Saunders Report* notes the relevance of an archaeological site, but also takes account of the wider area as a "cultural and spiritual site".[67] One question being asked in the Hindmarsh Island bridge debate

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[65] Woodward, p.100.
[66] Partington, p.5.
[67] *Saunders Report*, p.7, 8.

is are the cultural relationships of the Ngarrindjeri to Kumarangk sufficiently maintained to impede alternative uses of the land and water which would impact detrimentally on that relationship. As the crux of the Hindmarsh Island decision reflects meaning of land, it also highlights the necessity of defining what land is under review. In order to discuss Tickner's ban on the bridge, and O'Loughlin's judicial overturning of this, in terms of sanctionable tradition, I focus on the definitions of "site" and "area" in relation to the *Aboriginal and Torres Strait Heritage Protection Act 1984*.

Although the definition of "traditional" seems broader in the *Aboriginal Heritage Act* (see above) it is also true that the way in which 'site' and 'area' are defined in the federal Act potentially has an impact not only on the possible size of a heritage claim, but also on the rationale in making that claim.[68] The federal Act refers to a "significant Aboriginal area" which can include a "site", and can encompass areas of land or water being "of particular significance to Aboriginals in accordance with Aboriginal tradition".[69] When debating the federal Bill in 1984, Clyde Holding stated

> The use of the word 'area' rather than site will allow flexibility in recognising what Aboriginals believe to be significant. It will save a narrow and artificial approach being taken to sites, for example, to discrete geological formations.[70]

Indeed, the deliberate intent of the federal Act for wider areas to be protected suggests a flexibility receptive to evolving indigenous relationships to land. However, this Act needs to be explicit, as the implications are for rights to be

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[68] *ibid.* p.54 suggests a "lower threshold of protection" under the State Act.
[69] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s.3(1).
[70] Commonwealth of Australia *Parliamentary Debates (Hansard)* House of Representatives Vol.137, Commonwealth Government Printer, Canberra, 1984, p.2130.

bestowed which go beyond popular perceptions of what heritage protection entails. This is 'spatial' in a similar sense to that intended by Paul Carter (see chapter three), particularly his use of ambiguous language to make land accessible to new meanings. This does not mean that this openness makes the meaning conveyed a closer approximation of indigenous relationships to land, but it might at least provide a conceptual means for indigenous meaning to be acknowledged. However, Keen argues that flexible interpretation of "traditional Aboriginal owners" can easily become arbitrary, and this has implications for land as well as for an understanding of identity. [71]

In a Pitjantjatjara context, not only was there physical space to accommodate competing requirements of the land, but consequently more conceptual space for secrecy to be respected. For example, provision was made for roads to be laid down taking into account significant and possibly secret places held by the Pitjantjatjara.[72] This contrasts with Hindmarsh Island where physical and conceptual space is more enclosed, and where flexibility becomes more contestable. Immediately before Tickner's decision, Michael Armitage suggested that the legal precedent being set by protecting an area rather than a site would "set up a minefield of conflicts between State and Federal Government Laws".[73] In particular, he suggested that the obligation under the South Australian Act to seek permission from the Minister to "damage, disturb or interfere" might relate to the whole island.

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[71] Keen, p.41.
[72] Toyne and Vachon, p.117.
[73] *Advertiser* 9 July 1994, p.3.

O'Loughlin's Federal Court decision to overturn Tickner's ban was made on matters of law, relating to inadequate attention by Tickner to his responsibilities under the Act.[74] Nevertheless, there are non-indigenous conceptual and epistemological factors which accord with the decision which need to be considered. Tickner's order under Section 10 of the Act was explicit as to the area being protected. However, the reasons for the ban related not only to protection of that defined location, but also reflected the conclusion that banning the bridge would protect a wider area of Ngarrindjeri relationships to land, that is, the ongoing cultural and sacred significance of Kumarangk.

According to O'Loughlin, Tickner failed to adequately "consider" the representations made to him as required by the Act.[75] Having debated with himself the meaning and implications of "consider", O'Loughlin concludes

> The Minister did not "*consider*", in any sense at all, the detail of the women's business . . .. But he did make his decision as a result of women's business, the subject matter that was discussed in the secret envelopes. The detail of the Minister's reasons for his decision, as set out in the amended s13 statement has already been set out; it shows quite clearly, the importance that was attached to the women's business. The Minister's entry into the issue of the bridge commenced with the letter of 23 December 1993 from the ALRM in which protection was sought for camp sites; it concluded with his s10 declaration being based primarily on women's business: his reasons for his decision made no reference to camp sites.[76]

However, according to O'Loughlin it was Tickner's other principal error that required the heritage order to be overturned:

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[74] O'Loughlin, p.7.
[75] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s.10.(1)(c).
[76] O'Loughlin, at 128.

> I am of the opinion that the published notice in the Gazette and local press was fatally flawed . . . it failed sufficiently to identify the area that was to be the subject of the report and it failed totally to appraise the interested members of the public of the information to which they were entitled.[77]

This published notice was Saunders' declaration that a report was to be prepared under section 10(4) of the Act. It described the area potentially requiring protection as "significant Aboriginal areas in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island".[78] The *Saunders Report* addressed the question of what "the area" precisely entailed, noting that a shift had occurred from a more limited to more expansive area. This reflected in part the fact that more site surveying had occurred on Kumarangk, but also that a more expansive notion of 'traditional' was being applied to the land, particularly with the emergence of the "women's business" as a heritage protection factor.[79]

O'Loughlin is not concerned to question the principle of a broader area, rather suggesting that this was not clear for those making submissions based on their reading of the advertisement. He seems perplexed that the areas of land covered by Tickner's section 10 declaration were ultimately the same as the land clearly defined in the section 9 declaration.[80] Although the reasons for this might not be relevant to O'Loughlin's judgment they point towards the complexities of using (interpretations of) cultural identity to adjudicate on land rights. There are far different political implications in protecting a (narrowly defined) 'site' for the sake of the 'site', and protecting a (narrowly defined) 'site' for the sake of the wider cultural 'site' or 'area'.

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[77] *ibid.* at 129.
[78] Commonwealth of Australia *Gazette*, *Special* No.S 184, Thursday, 26 May 1994, AGPS, Canberra, p.1; see also *Saunders Report* p.7.
[79] *Saunders Report* p.9.
[80] O'Loughlin, at 72.

The question of whether Tickner adequately "considered" the secret knowledge is not only an important legal question in itself, but raises broader questions about repeating of secret or sensitive knowledge.[81] The *Fergie Report* indicates that the Ngarrindjeri women who associated their names with the "women's business" were ambivalent about disclosure even when it appeared to be the only remaining way to stop the bridge, an aspect of site identification that has been previously identified. Fergie reported the view of a Ngarrindjeri woman, who was regarded by her group as its "most traditional". Connie Roberts, through her daughter, expressed to Fergie that "the traditions at issue were things that should never be questioned in the way that is required by the process of having it declared under this Heritage Act".[82]

As Fergie shows, even the process of identification of knowledge is a dilemma with political connotations:

> If, as in this case, information is strictly restricted in Aboriginal tradition and disclosure beyond those limits would amount to a desecration of tradition, can the Minister be entailed in such an act of desecration under an Act whose legal objects are to protect such tradition from injury and desecration?[83]

The production of evidence to settle a dispute is itself expecting a European process to produce a European outcome. What is a 'site' as opposed to an 'area' - how limited or expansionary can potential protection be for a site of significance? Can the potential damage not simply be to the site itself, but rather impact on a

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[81] Fergie "Who's sacred sites?" p.20, discusses confidentiality in law in general to point out that secrecy over indigenous knowledge is not unique.
[82] *Fergie Report*, p.5.
[83] Fergie "Who's sacred sites?" p.20. See also *Saunders Report*, p.27; Barry Morris "The politics of identity: from Aborigines to first Australian" in Beckett (ed) *Past and Present* pp.79-80; Bell, pp.288-290.

whole area? The precedents being set are themselves convoluted, and subsequent debate is likely to remain confused while it is possible for protagonists to debate using different meanings for the same terms.

Such an approach invites complexities and indeed promotes an impasse of a practical nature brought on by ontological differences over the significance of Hindmarsh Island and in particular the significance of Hindmarsh Island remaining *separate* - that is, *not physically connected* as to suggest one piece of land - to the mainland. The South Australian government administered the *Aboriginal Heritage Act 1988* to provide certainty based on a narrow interpretation of site. Saunders suggests that "in general", as opposed to in the instance of the Hindmarsh Island bridge, "the coverage of the State Act . . . is wider than that of the Commonwealth Act".[84] However, the form of protection under the State Act is "detailed and prescriptive", whereas the federal Act is broader, suggesting "a lower threshold of protection under the State Act".[85] Tickner's use of the federal Act in effect preserved a 'site' to protect a wider significant 'area' in a region of 'settled' Australia. I argue that the political implications of this require more detailed attention - in the case of Hindmarsh Island, the federal Act allowed for a flexible meaning of land, but the proposition that a wider area of land could be protected by heritage legislation has caused consternation and confusion among some elements of non-indigenous society.

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[84] *Saunders Report* p.6.
[85] *ibid.* p54.

**reconciling certainty and complexity**

If we adopt an expansive indeed esoteric interpretation of sanctionable tradition, such as legally acknowledging heritage rights stemming from ongoing relationships to Kumarangk, then I argue that popular interpretations of equality before the law are resistant to implications of ongoing indigenous relationships to land. In this context, the ambiguity suggested by a 'spatial' interpretation can appear limiting as well as expansive. Spatial possibilities can be viewed in the same way as reconciliation possibilities, that is, sufficiently nebulous to allow any preferred meaning to predominate. In contrast, the certainty which miners, pastoralists, governments and others require is mainly an economic certainty, although one which is subject to environmental and community constraints as well as factors of land rights.

Nevertheless, this certainty connects to a requirement that the history on which this certainty ought be based is also well-established and immutable; this, in turn, with respect to land, requires that indigenous relationships to land also conform. A bridge linking Goolwa to Hindmarsh Island was necessary as part of a plan to develop the island and in particular to establish a marina. The need for 'certainty' means a privileging of economic imperative, but also a guarantee that anything that inhibits that progress is both valid and of great importance. This can lead to the situation where indigenous relationships to land can be political and/or legally respected, so long as they conform to capitalist imperatives within liberal-democratic principles. In 'settled' Australia, apportioning land rights against other factors necessarily occurs in a more constrained environment. A theoretical discussion might be able to superimpose different and possibly conflicting , given

that a number of different perceptions may be included without the need for their relative 'correctness' to be ranked. Nevertheless, such discussions do not translate comfortably into a policy forum:

> The balancing act performed in assessing whether or not sites are protected or "development goes ahead" involves an assessment of the pecuniary and proprietary interests of those other than Aboriginal interests, together with the significance of the area to Aboriginal people . . .. It is an impossible task in one sense. There seem to be two different balancing beams, or value systems, which have difficulty accommodating each other.[86]

The connection here is of an ongoing, revitalising Ngarrindjeri identity, linked to an area of land and water which it is suggested is still able to serve metaphysical if not all physical needs. I argue that no institutional or conceptual regime currently exists in Australia which conceives both of certainty and more expansive concepts of what indigenous rights to land involve without one of those concepts being shaped to suit the requirements of the other.

In this context, the federal government-initiated "process of reconciliation" can be used to adopt a mediating role that stifles necessary complexities. The Council of Aboriginal Reconciliation's vision is "a united Australia which respects this land of ours; values the Aboriginal and Torres Strait heritage and provides justice and equity for all".[87] Chairperson Pat Dodson has described the Council's aims in more explicit terms than this 'vision':

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[86] ALRM *Significant Aboriginal Areas in the Vicinity of Goolwa and Hindmarsh (Kumarangk) Island, South Australia* Representations by Aboriginal Legal Rights Movement Inc. on behalf of the traditional owners of Kumarangk and the Lower Murray Aboriginal Heritage Committee to Professor Cheryl Saunders in relation to Section 10(4) Aboriginal and Torres Strait Islander Heritage Protection Act 1984 1994, p.18.

[87] Council for Aboriginal Reconciliation *Making Things Right - Reconciliation After the High Court's Decision On Native Title* Commonwealth Government Printer, Canberra, 1993, p.1.

> How do you change the racist basis of this society to enable the achievement of a level of rights for Aboriginal people, without creating fear and sending shock waves down the spines of people in many parts of Australia? How can people become a lot more comfortable about the idea that in other parts of the world there are systems of power sharing that haven't thrown those countries into chaos, that haven't resulted in a division of their nation? How do we create that in this country? Our Council will work towards trying to achieve that level of maturity within the nation and it's not going to be any easy task.[88]

The process of reconciliation emerged as treaty debate faltered following the Bicentenary, although the term "national reconciliation" was also used by Federal Labor in its 1983 election campaign.[89] The issue of land is one aspect of a broad educational and practical process, but it remains a mandate of the Council

> to consult Aboriginal and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or documents of reconciliation.[90]

However, I argue that the process of reconciliation is designed to be so encompassing that it seems able to benignly accommodate different viewpoints. At the same time, the word 'reconciliation' carries a constraining implication, as in 'to settle' through imposed non-confrontation. Indeed, the term 'reconciliation' has been criticised by some Aborigines. Rob Riley states "In short, I cannot see that Aborigines have anything to reproach themselves for".[91]

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[88] Council for Aboriginal Reconciliation *Annual Report - 2 September 1991 to 30 June 1992* AGPS, Canberra, 1992, p.1.

[89] Bob Hawke "National Reconciliation: The Policy of the Australian Labor Party" *National Reconciliation: the Speeches of Bob Hawke - Prime Minister of Australia* selected by John Cook Fontana/Collins, 1984, pp.11-39.

[90] *Council for Aboriginal Reconciliation Act 1991* (Cwlth) s.6.(1)(g).

[91] Rob Riley "Reconciliation?" *Reconciliation 1988 - Aborigines and other Australians, Wikaru* Vol.15, July 1987, p.19.

One difficulty for such concepts of reconciliation is that its aims are expressed in sufficiently vague terms that those for and against distinct indigenous rights can appropriate the language of reconciliation. Partington links the Hindmarsh Island bridge debate to concepts of reconciliation through resort to concepts of legal and community equality:

> Mr Tickner and Mr Keating claim they wish to bring together Aborigine and non-Aborigine. Yet if any group of Australians is given special privileges in law and public policy not available to other Australians, and if some of the unprivileged suffer serious disadvantages as a result of granting those special privileges, there is bound to be hostility and resentment towards those receiving the privileges. This would be the case irrespective of the nature of the privileged group.[92]

Similarly, following Tickner's decision to ban the bridge in July 1994 an editorial in the *Advertiser* newspaper argued that:

> Australia is supposed to be undergoing a process of racial reconciliation as an essential herald to genuine equality. In this case it is doing so by a path of the most flagrant, objectionable and anti-democratic discrimination.[93]

This indicates an interpretation of 'reconciliation' as affirming mediation over concepts perceived as agitating or unsettling. The constraining element of reconciliation is not only employed by those who question the concept of land rights. Frank Brennan suggests that

> Searching for options, politicians have spoken of a treaty and now an instrument of reconciliation. The limits of what is achievable can be set down in light of the history of recent treaty talk.[94]

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[92] Partington, p.10.
[93] "Editorial Opinion" *Advertiser* 11 July 1994. p.16.
[94] Frank Brennan *Sharing the Country* Penguin Ringwood 1992, p.57.

Brennan places these limits within the native title regime set out in *Mabo*. He considers that the recognition of native title in turn provides a strengthened argument for recognition by statutory or other means of other aspects of indigenous relationships to land. Indeed, he considers that indigenous communities are now legally entitled to self-determination "within the life of the nation".[95] However, by not questioning the Australian state's existing affirmation of self-determination, Brennan equivocates on the content of that commitment. In doing so, he submits to a version of self-determination which, paradoxically, seems essentially a state vision and one, moreover, which has shaky foundations in 'settled' Australia if based on a recognition of native title.

Simpson suggests that in "politically controversial disputes" such as *Mabo*, courts must "attempt a reconciliation of legal, historical and political imperatives":

> the search for coherence embedded in this project is recognized as invariably doomed because of the deeply conflictual nature of these competing discourses. This necessitates judgments that, while often adroitly finessed, cannot ultimately bear the jurisprudential weight placed upon them.[96]

However, the act of making law would seem precisely to involve the reaching of 'settled' conclusions through the privileging of preferred precedent. Simpson's implication is that *Mabo*, in attempting to bring together divergent perspectives, creates a new regime with solutions that become superficial under legal pressure. This might be true, but I argue that *Mabo* only *contains* solutions when the complexities it avoids are subordinated to the precedent it creates. *Mabo* could

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[95] Frank Brennan "*" in M.A. Stephenson and Suri Ratnapala (eds.) *Mabo: A Judicial Revolution - the Aboriginal Land Rights Decision and its Impact on Australian Law* Univeristy of Queensland Press, St Lucia, 1993, p.27.

[96] Gerry Simpson "*Mabo*, international law, *terra nullius* and the stories of settlement: an unresolved jurisprudence" *Melbourne University Law Review* Vol.19 June 1993, p.197.

instead be seen as judicial confirmation that land rights debate is multi-faceted. Conceptually, we can choose to interpret *Mabo* as narrowly as a judge would, or we can place it within the context of the land rights debate from which it emerged. In particular, we should insist that historical and political debates relating to land and identity, which we should see as multi-faceted and often discomposed, be extended outside the High Court to realms of society where a formularised answer is not the main objective.[97]

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The granting of land rights in Australia has been gradual. Indigenous heritage protection is an important aspect of this land rights regime, and may be a step towards a recognition of the need for Australian concepts of land to become more adaptable. This is because although, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* the right bestowed is limited, that is, a title to land is not available, nevertheless the 'spatial' basis offers flexibility if not ambiguity. The Hindmarsh Island debate shows that such an attempted accommodation between new theoretical perceptions of Australian land, and evolved indigenous relationships to land, will be as difficult and as uncomfortable as previous stages in land rights debate have proved to be. At the same time, formal mechanisms remain in place for a continuation of incremental change, and for concepts and ideas to be tested in public fora. The history of change, the affirmation of contemporary Aboriginality and the recognition of ongoing indigenous

[97] I do not consider it necessary to engage with Dworkin over whether judges can reach 'right' answers in difficult cases (see Ronald Dworkin *Taking Rights Seriously* Duckworth, London (1977) 1978 pp.280-90. I do argue the legal conclusion does not need to be viewed legally once it is applied to society and not only to the matters before it in judicial proceedings. In this thesis, I am interested in what happens with *Mabo* when it enters the public domain.

relationships to land are recast into a new kind of right, the possibilities and limitations of which are yet to be tested.

## Conclusion

> How does one deal with what changes and yet stays itself?[1]

The anthropologist William Stanner posed this question in 1958, as he sought to comprehend indigenous people whose lives did not conform to representations of either 'traditional' Aborigines or assimilated citizens. Without attempting to depict Aboriginality, this thesis considers the implications of land rights stemming from this recognition that Aboriginality does not conform to an imposed division of 'traditional' or 'assimilated'. However, Stanner's question can apply to Australian democracy as well as to indigenous society. A recognition of land rights based on indigenous relationships to land necessitates a response from the state that not only perceives of complex Aboriginality, but also accepts that dominant concepts of land and identity in Australia might need to adapt.

In Australia, an active and progressing land rights debate indicates that this change, and the debate over its implications, is underway. This suggests the development of a less trenchant governmental and bureaucratic attitude to that suggested by John Bodley, whose premise is

> that government policies and attitudes are the basic causal factors determining the fate of tribal cultures, and that governments throughout the world are primarily concerned with the increasingly efficient exploitation of the human and natural resources of the areas under their control.[2]

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[1] W.E.H. Stanner "Continuity and Change among the Aborigines" White man got no dreaming Essays 1938-1978 Australian National University Press, Canberra, 1979, p.42.
[2] John H. Bodley *Victims of Progress* Benjamin/Cummings, Mento Pk, 1975, p.v.

This view is simplistic if applied to Australia where connections between indigenous identity and land rights have been made. A more complicated history of appropriation settlement indicates that the state (and its citizens) has responded to a range of social and ideological as well as economic factors. In one sense, a recognition of land rights requires an understanding that Aborigines should not be required to include a victim mentality in their modernised traditional attachment - that is, pro-activity to publicise indigenous relationships to land should not be deemed to extinguish tradition. At the same time, Aboriginality may involve efforts to resurrect and continue to reshape pre-contact traditions. This is heightened when land rights legislation requires the demonstration of ongoing relationships to land. Nevertheless, Aboriginality also appears to be defined by the evolution that has occurred in indigenous communities in the context of appropriation settlement. If Aboriginal people and communities are to define Aboriginality, the state must take account of these complex concepts relating to identity when they attempt to officially recognise indigenous relationships to land.

If there is a foundational tenet to this thesis, it is the conundrum of defining distinct and permanent rights within the established but fluid democratic and capitalist nation-state. As we attempt a more detailed understanding of Aboriginality, it does not necessarily become easier to acknowledge rights. Mick Dodson suggests, "As always, it is a question of how well the Australian community is willing and able to understand our relationship to land".[3] Somewhat differently, the issues I raise focus on the ability of the Australian community to accept land rights based on indigenous relationships to land *when they do not necessarily understand them,* and particularly when then they might not

[3] Mick Dodson *Aboriginal and Torres Strait Islander Social Justice Commission* First Report, AGPS, Canberra, 1993, p.27.

automatically and without complication conform with other Australian concepts of land and identity. This does not amount to a plea for a lack of understanding. I suggest that the validity of the concept of 'land rights' should not be dependant on an intimate understanding of indigenous relationships to land.

Although in many ways this is an historical work, it is located in the present and therefore is faced with the possibility of events overtaking its prescribed chronology. I have deliberately taken a broad, conceptual view, not specifically to avoid this (unavoidable) eventuality, but because I argue that current affairs is too limiting and immediate: context is needed at the time of policy debate, as well as in retrospect a decade or two (or century or two) later. In any case, change is incremental and unpredictable; a new development such as *Mabo* does not make previous elements of land rights debate obsolete, indeed native title cannot be understood without reference to them.

Nevertheless, it should be recognised that at the time of writing the South Australian Royal Commission into the veracity of Ngarrindjeri relationships to Kumarangk is ongoing. The anthropological and legal evidence, and perhaps in particular the role of the media, will be important areas for future research. The Federal Court is still considering Robert Tickner's appeal against Justice O'Loughlin's overturning of his ban under section 10 of the *Aboriginal and Torres Strait Heritage Protection Act 1984*. A federal inquiry, perhaps focusing on the Act as much as specifically on Hindmarsh Island, appears likely. Unresolved issues relating to native title and pastoral leases are being tested in court via the Waanyi people's native title claim. However, I reiterate that although this thesis is located in the present, this is specifically to place post-*Mabo* land rights debate in broader

historical and political contexts. It is therefore intended that the conceptual and epistemological arguments being made will remain relevant regardless of new developments.

However, as I avoid prescriptive 'solutions', it is necessary to summarise the progressive argument made here. This thesis explores some of the complexities involved in acknowledging indigenous relationships to land in 'settled' Australia. If the principle of indigenous relationships to land is acknowledged, how does the Australian state, and Australian society, respond and react? In post-*Mabo* Australia, I argue that political theory needs to consider in more depth the concept of land rights, and in particular how land rights alters perceptions of Australian democracy.

I argue that native title stemming from *Mabo* is limited, especially in 'settled' Australia, and needs to be interpreted in the wider context of land rights debate. However, native title is another example of official recognition of land rights stemming from indigenous relationships to land. This means that the land is unsettled, in that there exist different interpretations of land and how land should be used. This exists despite the confirmation of Australia as a sovereign nation-state. Moreover, the land is unsettled now, as well as in the past where is it now widely accepted that Aborigines struggled against appropriation settlement.

Related to this, it is increasingly accepted that Aboriginality is not changeless, as in grounded in a static 'traditional' past, and that ongoing Aboriginality connects with ongoing relationships to land. With this connection of land and identity in mind, I argue that meaning of land should be interpreted with more flexibility -

for example, in a 'spatial' way which 'opens' the land to new ideas and perceptions, and in particular suggests the possibility of superimposing different ideas over the same land. This is critical in 'settled' Australia where it appears most existing land titles will not be challenged by the theoretical persistence of native title.

However, while arguing for this interpretation of land, two complications emerge. One, the more 'settled' (that is, the more confined the space, and the more intrusive appropriation settlement has been) the more difficult flexibility over land becomes in practice. Two, if the meaning of land is flexible then interpretation can easily become arbitrary. Moreover, deliberate conceptual ambiguity leads towards contestability when theory is applied and law is implemented. Nevertheless, ambiguity is not ambivalent but is challenging, whereas an assumption of 'certainty' amounts to an avoidance of necessary complexity.

Here a new conundrum emerges from the attempt to transcend the division of 'traditional' and 'assimilated'. In order for land rights to be based on ongoing traditional attachment, the 'settled' Australian landscape needs to be seen as unsettled. However, this is more easily achieved conceptually - through anthropological, historical and geographical narrative - than through political process. As well, while flexibility allows for more perspectives to be debated, it does not necessarily advance - indeed it sometimes rejects - practical solutions. Even as this fresh approach allows for the possibility of acknowledging indigenous relationships to land in 'settled' Australia, it re-affirms in complicating and confusing ways issues it only partially succeeds in resolving.

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[2] While convention tends to exclude both legal authorities and legislation from bibliographes, here the language and use of both are essential and listings are therefore appropriate.

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